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IRISH CHANCERY REPORTS. <sup>p</sup>

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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY,

Court of Appeal in Chancery,

ROLLS COURT,

THE LANDED ESTATES COURT,

AND

COURT OF BANKRUPTCY AND INSOLVENCY,

IN

IRELAND,

DURING THE YEARS 1860 AND 1861.

*Chancery, and Court of Appeal in Chancery:*

BY JOHN PITT KENNEDY, ESQ. WILLIAM HICKSON, ESQ.  
AND LESLIE S. MONTGOMERY, ESQ.

*Rolls:*

BY EDWARD SHIRLEY TREVOR, ESQ.

*Landed Estates Court:*

R. W. M'DONNELL, ESQ. AND ROBERT REEVES, ESQ.

*Court of Bankruptcy and Insolvency:*

BY JOHN O'LEARY, ESQ. AND GEORGE CREE, ESQ.

VOL. XI.

DUBLIN:

HODGES, SMITH & CO., 104 GRAFTON STREET.

1861.

*Rec. Jan. 26, 1869*

Printed by DAVID CORBET, 11 Upper Ormond Quay, Dublin.

# JUDGES AND LAW OFFICERS,

*During the period of these Reports.*

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## HIGH COURT OF CHANCERY.

*Lord Chancellor.*—The Right Hon. MAZIERE BRADY.

*Master of the Rolls.*—The Right Hon. THOMAS BERRY CUSACK SMITH.

## COURT OF APPEAL IN CHANCERY.

The Right Hon. THE LORD CHANCELLOR.

*Lord Justice.*—The Right Hon. FRANCIS BLACKBURN.

## LANDED ESTATES COURT.

*Judges.*—The Hon. MOUNTIFORT LONGFIELD.

The Hon. CHARLES JAMES HARGREAVE.

The Hon. WILLIAM C. DOBBS.

## COURT OF BANKRUPTCY AND INSOLVENCY.

*Judges.*—The Hon. WALTER BERWICK.

The Hon. DAVID LYNCH.

## ATTORNEYS-GENERAL.

The Right Hon. JOHN D. FITZGERALD, Q. C.

The Right Hon. RICKARD DEASY, Q. C.

The Right Hon. THOMAS O'HAGAN, Q. C.

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**MEM.**—In the Long Vacation of 1860, Mr. Serjeant FITZGIBBON was appointed Master in Chancery, in the room of A. LYLE, Esq.

N.

Ada  
Atto  
Atto

**CORRIGENDA.**

Page 205, line 14 from top, *for* "two" *read* "four."

„ 309, line 2, *for* "there are two parties," *read* "there are not two parties."

„ 335, first line of second paragraph, *for* "incumbered," *read* "unincumbered."

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Bulfi  
Burg  
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Carr  
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**CHANCERY REPORTS,**  
 BEING A SERIES OF  
 CASES ARGUED AND DETERMINED  
 IN THE  
**HIGH COURT OF CHANCERY,**  
 COURT OF APPEAL IN CHANCERY,  
*Rolls Court, Landed Estates Court,*  
 AND  
 COURT OF BANKRUPTCY AND INSOLVENCY

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**Court of Appeal in Chancery.**

In the Matter of the Estate of  
**JOHN WILLIAM BURMESTER, FARMERY JOHN LAW**  
 and **JAMES SADLEIR, Owners and Petitioners ;**

Continued in the names of  
**JOHN WILLIAM BURMESTER, WILLIAM CORY**  
 and **JAMES ANDREW DURHAM, Owners and Petitioners ;**  
**THOMAS JOSEPH EYRE, Appellant.**

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 May 29, 31.

**THE** following were the material facts disclosed by the pleadings and affidavits in this case :—In the years 1843, 1844 and 1845, Mr. Eyre, the appellant, had employed John Sadleir deceased, as his

S., being largely indebted to B. and other persons, agreed with B. for a further

advance, on a mortgage of various estates in Ireland. By the deed of mortgage, S. covenanted that the lands of K., which formed part of the security, were free from incumbrances, and for further assurance. No title was furnished by S., nor search in the registry in Ireland made by B. Before the entire advance was paid over to S., it was discovered that the lands of K. were subject to a mortgage to E. B. thereupon applied to S., who told him that E. would release the lands, on his (S.'s) request; on which assurance B. paid over the residue of the loan to S. S., subsequently, by fraud, procured a release from E., of which release B. was made aware, but was ignorant of the fraud. The fraud was discovered after some months had elapsed.—*Held*, that B. was a purchaser for value of the release, as having been procured by S., in pursuance of the covenants in the mortgage deed; and that, being ignorant of S.'s fraud, he was entitled to retain the advantage which the release had given him.

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solicitor, in the matter of a certain loan of £40,000, made by Mr. Eyre to the Earl of Kingston, upon mortgage of the said Earl's life estate in certain lands; and of a certain other loan of £12,000 to Henry Smith, Esq., upon mortgage of certain estates of the said Henry Smith; and, by reason of the insufficiency of the securities taken, or the misconduct of John Sadleir in that behalf, a great risk had arisen that the said sums would be lost; and thereupon John Sadleir agreed to secure Mr. Eyre against any ultimate loss in respect of the said loans, by executing a mortgage of certain lands of the said John Sadleir, as collateral security to Mr. Eyre.

Accordingly, by indenture of mortgage of the 20th day of October 1854, after reciting that the said sums of £40,000 and £12,000 had been advanced by Mr. Eyre, by the hands of John Sadleir, and that the said John Sadleir had agreed to secure him against any ultimate loss, by reason of such advances, in the manner therein provided, it was witnessed that the said John Sadleir granted to Mr. Eyre and his heirs all the lands therein mentioned, including the estate of Kilcommon and other lands sold in this matter, subject to redemption in case the said John Sadleir should repay the said sums so advanced as aforesaid, with interest at £6 per cent. And by the said deed of mortgage the said John Sadleir and Mr. Eyre duly constituted and appointed Mr. James Barron Kennedy as agent and receiver of the rents of the said estates; and it was by the said deed of mortgage provided that the said James Barron Kennedy should, out of the said rents, in the first place, keep down the interest of certain incumbrances affecting the said lands, and, in the next place, pay to Mr. Eyre an annual sum of £3000, in part liquidation of the said moneys so advanced by and remaining due to him, and should pay the residue of the said rents to the said John Sadleir. It was further provided that the said John Sadleir should be at liberty to sell the lands, as therein mentioned, but not for any less price than that for which the same had been purchased by the said John Sadleir in the Court of Incumbered Estates; and that the produce of the sale should be invested as a security, in place of the lands sold. This deed of mortgage was duly registered in Dublin, on the 19th day of December 1854.

John Sadleir had become a director and the chairman of the London and County Bank, in or about the year 1848, and, from that time, in conjunction with various co-directors of the said Bank, he was engaged in a great variety of speculations and adventures in many parts of the world; and the funds necessary for such speculations were supplied by very large advances of money made by the said Bank to him, as its chairman, in direct violation of the existing laws of the said Bank, and upon very inadequate security.

Previously to the year 1853, the said John Sadleir had deposited with the said Bank, as a security to cover his debt to the said Bank, a certain deed, called "the Chandos mortgage deed," by which certain estates of the Duke of Buckingham and the Marquis of Chandos purported to be mortgaged to the said John Saldeir, to secure the sum of £134,934. 8s. 1d., as due to him; and, afterwards, with the permission of some of the parties connected with said Bank, he obtained possession of the said Chandos mortgage deed indirectly, and without the knowledge of the board of directors of the said Bank, and raised a sum of £55,000 from other persons, which he applied to his own use, having, nevertheless, undertaken to pay the same to the said Bank, in reduction of his debt to them. He subsequently deposited with the said Bank a certain other deed, called "a declaration of trust of the said Chandos mortgage;" and, afterwards, clandestinely abstracted from the Bank the said deed of declaration of trust, and raised upon the same a further sum of £10,000, which he also applied to his own use, all which matters were well known to the directors of the Bank.

In the month of May 1855, John Sadleir appears to have owed the Bank £250,000 and upwards, upon loan and discount; and, in the month of June 1855, a further advance was made to him, of £25,000, upon discount of a bill for that amount, drawn by the Tipperary Joint-stock Bank, of which James Sadleir, the brother of the said John Sadleir, was the sole managing director.

On the 24th of July 1855, John Sadleir applied to the Bank for a further loan of £15,000, which was refused; and, on the same date, the Bank refused to honor his cheques, and closed his drawing account, of which they gave him notice. James Sadleir, thereupon,

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and on the same 24th day of July, applied to the Bank for a loan of the sum of £15,000, upon the security of his promissory note for that amount at twenty-one days; and such advance was made to him accordingly, but in fact for the urgent necessities of the said John Sadleir, as was well known to the directors.

On or about the 26th day of July 1855, James and John Sadleir proposed to the said Bank that they should advance, out of the funds of said Bank, a further sum of £95,000, to meet the most pressing demands on the said John Sadleir, and that, to secure the whole of the debt of the said John Sadleir to the said Bank, including the said sum of £95,000, all the available property of the said John Sadleir should be vested in trustees to sell; and James Sadleir then stated and represented that John Sadleir was entitled to real estates in Ireland, to the value of £174,000, which were to be included in such security; and James Sadleir, as managing director of the said Tipperary Joint-stock Bank, agreed to give the guarantee of the said Bank for the repayment of the whole amount of the said debt of the said John Sadleir to the London and County Bank, amounting to the sum of £300,000, or thereabouts. To this proposition the London and County Bank agreed, on the 31st of July. Two days later, viz., on the second day of the following month of August, twenty deeds of conveyance were executed by the said John Sadleir, bearing date respectively the 1st day of August 1855, whereby he conveyed, or purported to convey, to John William Burmester, Farmery John Law and the said James Sadleir, as trustees, divers lands and estates in Ireland, including the said estate and lands of Kilcommon, and the other lands included in Mr. Eyre's deed of mortgage of the 20th day of October 1854; and, on the same 2nd day of August, the said trustees executed a declaration of trust, in writing, whereby it was declared that the said trustees would hold all the said real and personal estate so vested in them, in trust to sell, and, out of the proceeds, to pay all sums due by the said John Sadleir to the said London and County Bank. It did not appear that, with respect to the said estates, any statement of title to the same was ever made by the said John Sadleir or the said James Sadleir to the Bank or its

solicitors, or that the Bank, or its solicitors or agents, ever saw any deed or document evidencing the title of the said John Sadleir to the same; or that they inquired whether the said John Sadleir was in fact in possession of or in receipt of the rents of the said lands, or that any search or inquiry was made by the said Bank for incumbrances or judgments affecting the said lands.

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On or about the 10th day of August 1855, Mr. Stevens, of the firm of Wilkinson, Gurney & Stevens, solicitors for the London and County Bank, went over to Dublin, for the purpose of registering the twenty deeds; and Mr. James Barron Kennedy, who was a member of the firm of Messrs. Morrogh & Kennedy, in Dublin, was employed by the Bank to assist in the registry thereof. Mr. Kennedy had acted as Mr. Eyre's solicitor in the matter of the said mortgage of the 20th of October 1854, and had been named receiver therein; and, being thus aware of the existence of that security, he informed Mr. Stevens thereof; and Mr. Stevens, thereupon, on or about the 13th day of August, wrote to his said firm in London, and also sent a message by telegraph to John Sadleir, mentioning to both Mr. Kennedy's communication, and desiring his partners to prevent the Bank parting with more money until the matter was cleared up.

On the said 13th day of August 1855, John Sadleir wrote to Mr. Eyre, who was then in Bath, a letter, as follows:—

“London, August 13th 1855.

“MY DEAR MR. EYRE—I suppose you have with you the indemnity deed signed by me, in which we both agreed that a proviso should be to the effect that I might substitute for the lands included in the deed other lands, or shares paying £5 per cent. *I am transferring now the lands included in the deed*, in order to enable me to pay up all my shares in the Royal Swedish Railway, which is likely to turn out a very valuable concern, and to provide for other payments, such as calls on the East Kent shares I hold, and other matters; and I want you to instruct J. B. Kennedy to prepare, at my expense, such deed or deeds as may be requisite to carry out our instructions according to the proviso in the indemnity deed. My notion is that, as I have to pay you £3000 a-year, and, as I



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shall be entitled to £3000 a-year on 12,000 Royal Swedish shares of £5 each, fully paid up (and with coupons for the interest at £5 per cent., payable half-yearly), it is better for you, and also for me, to have this certain means of my paying the £3000 regularly to you, than I should lose the present opportunity of making a general arrangement as to the mortgaged lands, which certainly enables me to have a very large stake in the Railway, which will have its first opening in next month. If you desire to have more property in the indemnity deed than the £60,000 of Railway shares, paying £3000 a-year, I have no objection to have the Wall lands, as they are to be included in the security for the Wall purchase-money (after Moore's £15,000), also made liable under the indemnity; and, if you would prefer that the yearly payment by me to you should be £5000, and not £3000, I shall be quite prepared to meet your wishes in this particular; for, certainly, by substituting the Railway shares, paying £5 per cent., for the lands, I become enabled to pay £5000 a-year far easier than £3000 without such an arrangement. If I have not sufficiently explained this matter to you in this letter, I shall go to Bath, and explain my position and plans to you more fully. I hope you will be able to write to me a line by Tuesday's post, to No. 11 Gloucester-square, for I am rather anxious not to let the present opportunity slip; and, from what I have heard this day, I feel unwilling to delay the affair. You might wish to refer to J. B. Kennedy the task of carrying out the alteration in the indemnity, and the substitution of property according to the proviso in the original deed, in a way which would be just and proper, as regards our respective interests; and, with that view, I think if you sent him this letter, with your own written instructions, the business could be done by him in a satisfactory manner. Of course, before I would expect you to sign any deed of release of lands, I should hand you over the Railway shares, with the coupons for the dividends or interest. I do not know whether you consider it unreasonable to wait for the £1500 I am to pay, until I get my coupons paid at the Royal Swedish next month; but if it is inconvenient to you to give me until then, I believe I can have no difficulty in discounting the coupons now at once, and so be able to pay in the £1500 to your

credit. If I have to go down to Bath on Wednesday, to see you on this indemnity business, I shall explain to you about Lord Chandos.

"I remain, my dear Mr. Eyre, yours sincerely,

"JOHN SADLEIR."

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On the following day (the 14th of August), Mr. Eyre wrote to John Sadleir a letter in reply, to the effect that he did not perfectly understand his proposition, but was willing to forward his views if safe, and that he would send Sadleir's letter to Mr. Kennedy for consideration; which accordingly he did on the same day. On the same 14th of August, and before Mr. Eyre's letter had reached Sadleir, Mr. Wilkinson (of the firm of Wilkinson, Greene & Stevens), having received Mr. Stevens' letter from Dublin, had an interview with Sadleir, who informed him that the mortgage to Mr. Eyre need form no difficulty, as Mr. Eyre would at once release at his request, and that he had written to Mr. Eyre with reference to the matter. On the 15th day of August, John Sadleir sent by telegraph, to Mr. Kennedy, a message as follows:—"Favourable letter from Bath, which I send you. He also writes to you." And on the same 15th day of August, Mr. Kennedy wrote and sent to Mr. Stevens, who who was then at Killarney, a letter as follows:—"I got the following message from London this morning:—'Favourable letter from Bath, which I send you. He also writes to you.' As yet I have not got Mr. Eyre's letter."

On the 15th of August, James Sadleir asked Mr. Wilkinson for a cheque for £10,000 (part of the £95,000) then in his hands; and also for another cheque for £15,000 (part of the same fund), for the purpose of paying off the £15,000 promissory note of James Sadleir. Mr. Wilkinson said that this money could not be paid until the matter of Mr. Eyre's mortgage was arranged; whereupon John Sadleir, who was present, stated to Mr. Wilkinson, that he had had a communication from Mr. Eyre, undertaking to release the estates from the mortgage; and in reliance on that assertion the two cheques (constituting the then unpaid part of the £95,000) were handed over.

On the same 15th day of August, John Sadleir wrote and sent to Mr. Eyre another letter, which was as follows:—

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" 11 Gloucester-square, Hyde Park, London,

" 15th August 1855.

" MY DEAR MR. EYRE—I am quite satisfied that the operation of substituting other security for the lands now included in the indemnity deed should be according to what J. B. Kennedy may consider right and fair as between us two. From the beginning to the end, I have but the one object, and that is, to manage matters so as that, whatever delays or annoyances you may have had to experience heretofore, no ultimate loss should at all events happen. This change of security will greatly facilitate me in my efforts, without, I trust, at all damaging your position. In fact whatever serves me, in this respect, cannot, I believe, damage you. The lands included in the indemnity deed are worth, I suppose, about £106,000, subject to mortgages to the amount of £46,000. I am looking to recovering losses on foot of lands, by the gain on the Royal Swedish shares; and I think that in proposing to substitute for the indemnity lands 12,000 Royal Swedish shares, producing £3000 a-year, and agreeing to the Wall lands standing also as an indemnity, and increasing the yearly payment to you from £3000 to £5000, I will be carrying out an arrangement which must be of the two more favourable to your interests than the present one. The present arrangement was the best I could offer and make at the time; but I told J. B. Kennedy at the time, that I would want to act on the proviso for liberty to substitute securities, in order to carry out my own plans for covering and protecting myself against loss. You must bear in mind that, after all, it may turn out that I will not have to make good a very serious loss, *in re Kingston*, and that when the policy for £4000, *in re Smith v. Dennehy*, falls in, the loss in that case will be lessened too. However, we shall see what view J. B. Kennedy will take of the matter. Mr. William Eyre has not any charge or claim on the Wall lands. He has obtained from me a security on portions of the Cahir lands, and the other lands not included in the indemnity deed; so that what I propose is, that your indemnity should attach on the Wall lands, subject only to Judge Moore's £15,000, and your own claim thereon.—I remain, my dear Mr. Eyre, yours truly,

" JOHN SADLEIR."

" To THOMAS EYRE, Esq."

On the 16th day of August, Mr. Kennedy received a letter from John Sadleir, written by him on the 15th of August, suggesting that Mr. Kennedy should go to Bath, to negotiate with Mr. Eyre the proposed substitution of securities, and inclosing Mr. Eyre's letter of the 14th of August. And on the 16th day of August, Mr. Kennedy received from the said John Sadleir another letter, inclosing a copy of a share in the Swedish Railway Company, and of the charter, prospectus and reports of that Company. Mr. Kennedy, having received such letters, wrote and sent to Mr. Stevens, who was still at Killarney, a letter as follows :—

“ 5 Great Denmark-street, Dublin, 16th August 1855.

“ MY DEAR SIR—I have had letters from Sadleir, also from Mr. Eyre, and I consider my best course is to go to Bath to-night, and arrange with Mr. Eyre as to the exchange, and for releasing his lands. I shall be back, I hope, on Monday, and meet you here. I send you letters, and leave your bag and deeds with Mr. Johnston. The parcel came to-day from Nicholas-lane, but the deed I want is not in it. I have written for it.—Yours truly,

“ J. R. STEVENS, Esq.”

“ J. B. KENNEDY.

Mr. Kennedy had previously informed Mr. Stevens that an exchange of the securities so held by the petitioner was intended to take place.

Mr. Kennedy left Dublin accordingly, on the 16th day of August, and arrived in Bath on the 17th of that month. On the 16th of August he sent the following telegraphic message to John Sadleir :—“ Dublin—To John Sadleir, Reform Club, London. I go to Bath to-night, and will telegraph to-morrow to Nicholas-lane\* what I do. I hope to leave Bath Saturday morning.” And during his journey, Mr. Kennedy sent a second telegraphic message to John Sadleir :—“ Stafford—To J. Sadleir, Reform Club, London.—To secure £5000 a-year there should be 20,000 shares of £5 each ; four per cent. only stated on the share sent.” And on his arrival in Bath, on the said 17th of August, he received from John Sadleir two telegraphic messages in reply, as follows :—“ From J. Sadleir, London, to J. B. Kennedy, White Hart Hotel, Bath.—

\* Where Messrs. Wilkinson, Gurney & Stevens had their office.

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The shares to the amount you mention can be given ; if not, other property. Dargan's note for £12,000, due 1st May next, can be given." From same to same:—"If requisite, James will guarantee the £5000 a-year; in May next, ten or twenty thousand could be paid." Mr. Kennedy did not send any telegraphic message to Nicholas-lane, inasmuch as, after his interview with Mr. Eyre, as next hereinafter stated, he was unable to state that Mr. Eyre would release his said security until the inquiries Mr. Kennedy was to make were satisfactorily answered.

On the said 17th day of August, Mr. Eyre had an interview with Mr. Kennedy, when Mr. Eyre agreed to the arrangement proposed, subject, nevertheless, to the result of certain inquiries to be made as to the line of Railway, and the value of the said shares ; and Mr. Kennedy undertook to go to London, to make inquiry respecting the said line and shares. Mr. Kennedy accordingly proceeded to London, and met John Sadleir there, on the evening of the said 17th of August, and handed to him certain queries in writing, as to the Railway and shares ; and, on the 18th of August the said Mr. Kennedy and John Sadleir had an interview, and the said John Sadleir then delivered to Mr. Kennedy answers in writing to the said inquiries, which answers Mr. Kennedy embodied in a letter written by him to Mr. Eyre, on the same 18th of August, recommending the acceptance of Sadleir's proposition.

On Monday the 20th of August, and not before, Mr. Eyre wrote to Mr. Kennedy, according to a form inclosed in the said letter, a letter as follows :—

" Bath, 20th August 1855.

"DEAR SIR—Upon the terms stated in your memorandum of the 18th instant, I will release the Irish estates of Kilcommon, Skehana, Boggawn, Castlegrace and Clonmore, from the indemnity given me upon them under the deed of the 20th of August 1854, and I request you will prepare the necessary documents for my signature.—Yours truly,

THOMAS EYRE."

And it was only then that Mr. Eyre had finally determined to accept Sadleir's proposal for a change of securities. However, Mr. Kennedy, on his arrival in Dublin, on Sunday the 19th of August,

immediately had an interview with Mr. Stevens; and, assuming that Mr. Eyre would act on his recommendation, told Mr. Stevens that the release would be executed, and, at his request, then wrote a letter, which, however, was dated the 18th of that month, and was as follows :—

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“ Great Denmark-street, 18th August 1855.

“ DEAR SIRs—We have arranged with Mr. Eyre to release the Kilcommon, Castlegrace and Clonmore estates, and hope to have the necessary deed executed in a week or ten days.—Yours truly,

“ MORROGH & KENNEDY.

“ To Messrs. WILKINSON, GURNEY & STEVENS.”

On the 13th day of October 1855, Mr. Eyre executed a certain deed of re-conveyance, made between him of the one part, and John Sadleir of the other part, and purporting to bear date the 5th day of October 1855, whereby, after reciting the deed of the 20th October 1854, Mr. Eyre, at the request of the said John Sadleir, re-conveyed all the lands therein comprised to the said John Sadleir, discharged of the trusts of the said indenture of mortgage.

In this deed no consideration was stated, nor any reason given for such re-conveyance. It was executed by Sadleir, in the office of the solicitors of the bank in London, in presence of one of their clerks and of Mr. Kennedy, and taken by Mr. Kennedy to Dublin, for registration; and Mr. Stevens deposed that, in the subsequent November, being in Dublin, he had inquired and was satisfied that the release was registered. On the same 13th of October 1855, Mr. Eyre executed certain indented articles of agreement, purporting to bear date the 6th day of October 1855, and made between the said John Sadleir of the first part, Mr. Eyre of the second part, and the said James Sadleir of the third part; whereby, after reciting the said indentures of the 20th of October 1854, and of the 5th October 1855, and that Mr. Eyre had agreed, in lieu of the said mortgage, to accept the securities therein mentioned, and reciting the delivery of the said Swedish Railway shares, and reciting that, by virtue of a special resolution of the said Railway Company, of the 26th of August 1855, the said shares bore interest at £5 per cent. per annum, it was witnessed that the said shares should be vested in Mr. Eyre, sub-

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ject to redemption on the terms therein expressed, and corresponding to the terms contained in the said deed of the 20th of October 1854. And by the said agreement the said John Sadleir covenanted to convey, by way of mortgage and further security, to Mr. Eyre, certain lands called the Wall or Coolnamuck Estate, subject to a certain other agreement of the 13th of May 1855, relating thereto, and entered into between Mr. Eyre and the said John Sadleir, and in which said articles were contained certain powers of sale, respecting the said last mentioned lands; and by the said articles, the said James and John Sadleir covenanted with Mr. Eyre for the payment of an annual sum of £5000, in liquidation of Mr. Eyre's demands; and it was declared, that any moneys received by Mr. Eyre, on foot of the said promissory note for £12,000, of the said William Dargan, should be applied in liquidation of his said demands.

At the time of the execution of the said agreement by Mr. Eyre, the said Swedish Railway shares, and also a copy of the said resolution of the 26th day of August 1855, and the said promissory note of the said William Dargan, were handed over to Mr. Eyre by Mr. Kennedy.

The intended mortgage of the lands of Coolnamuck was never executed, nor was any payment of money ever made under the provisions of the agreement of the 6th day October 1855. And it was discovered by Mr. Eyre, after the death of John Sadleir, and not before, and established by the evidence in this matter, that the Swedish Railway shares were forgeries; that no such minute or resolution of the said Railway Company was ever made, as pretended, and that the promissory note for £12,000, of the said William Dargan, was also a forgery. It was also proved that in fact the Wall or Coolnamuck lands were, previously to the date of the articles of the 6th day of October 1855, subject to charges which exceeded the value of such lands, and that the guarantee of James Sadleir was wholly worthless.

By an indenture of the 7th day of September 1855, executed between the said John William Burmester, Farmery John Law, and James Sadleir, of the one part, and the said John Sadleir of the other part, after reciting the execution of the said twenty deeds of

the 1st of August 1855, it was declared that the trustees should stand possessed of all the lands and premises thereby conveyed, upon trust to sell, and out of the proceeds to pay all incumbrances for the time being affecting the said lands, and upon trust, as to the residue or surplus of such proceeds, for the said John Sadleir absolutely; and by another deed, of the 8th day of September 1855, the said John Sadleir declared a trust of the said residue so coming to him, and that the same should be applied in discharging the sums due by him to the London and County Bank, and to the said Tipperary Bank.

John Sadleir died, by his own hand, in February 1856, insolvent; and that no payment was made to Mr. Eyre on foot of the said indenture of the 20th day of October 1854, except a payment of £3000, made on or about the 4th day of December 1855, in pursuance of the terms of the said indenture; and it was believed that the entire sums lent to Lord Kingston and Mr. Smith would be lost.

On the 30th of June 1856, the said trustees presented a petition to the Incumbered Estates Court, for a sale, among others, of the lands included in Mr. Eyre's mortgage; and Mr. William Cory and Mr. Andrew Durham having been substituted for Messrs. Law and the late James Sadleir as trustees for sale, the proceedings were carried on in the names of the new trustees, and the lands sold. On the ruling of the final schedule of incumbrances, on the 31st of October 1859, Mr. Eyre, in pursuance of an objection previously filed by him, submitted that, at the date of the declaration of trust, of the 7th of September 1855, his mortgage was in equity a subsisting charge on the said lands, and a trust was, by the last-mentioned deed, declared for the payment of the same, and that the said London and County Bank could claim nothing under the said last-mentioned deed, or the deed of the 8th of September 1855, except the surplus to which the said John Sadleir was entitled after payment of Mr. Eyre's mortgage, of the 20th of October 1854. The indenture of the 7th day of September 1855 was alone registered.

Judge Longfield, however, was pleased to order and adjudge—  
“That the said release of the 5th day of October 1855 was void as against any surplus coming to John Sadleir, but that the same was

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valid as regards the claim of the London and County Bank." And it was accordingly declared by the Court, that the objection of Mr. Eyre should be overruled with costs. Thereupon Mr. Eyre filed his petition of appeal, submitting thereby that Judge Longfield's order was erroneous, and ought to be reversed or varied, so far as it declared the said deed of release valid, as regarded the claim of the said London and County Bank, and so far as it overruled Mr. Eyre's objection; and that he ought to be declared entitled to a lien on the proceeds of the sales of the lands comprised in the said indenture of mortgage, of the 20th of October 1854, according to the rights conferred on him by that deed, as if the said indenture of reconveyance, of the 5th day of October 1855, had never been executed by him.

The *Attorney-General* (with whom were Mr. *Rogers* and Mr. *May*), for the appellant.

*Argument.*

The question in this case is entirely one of equity, as neither of the parties concerned has the legal estate in the lands, which are now vested in the heir-at-law of John Sadleir. The Bank, in this case, does not fill the position of a purchaser who advances his money on the faith of receiving an unincumbered estate as security. At the time of the mortgage, their advances to Sadleir, and their connection with him, had been such that they were obliged to take anything he had to give them as security for the further advances which, to save themselves, they were compelled to make to him. They never attempted to ascertain, by search in Ireland, or by any investigation of title whatever, what they were getting as security. In truth, therefore, whatever may be the form of the recitals and covenants in their conveyances, in substance they took subject to Mr. Eyre's mortgage, and any other that might appear. They had full notice, moreover, that, if Mr. Eyre released, it would be only on getting valid securities in exchange. They must have known that his release was subject to an implied condition that it should be honestly obtained. But, in fact, they are mere volunteers, as regards this release; they never paid a shilling on the faith of it. The great bulk of their money they paid without having taken the

ordinary precaution of inquiring into Sadleir's title, and, therefore, in ignorance of the mortgage; and then, notwithstanding notice, paid out the remainder of their money, on a promise of Sadleir that he would obtain a release, and without any communication with Mr. Eyre himself. It was not until long afterwards that Mr. Eyre re-conveyed; and, up to the moment of re-conveyance, he had never bound himself to do anything. As far as they were concerned, it was a purely voluntary act; and, so far were they from acting on it, that they did not see the deed until after Sadleir's death, and they do not appear to have been even aware that it was executed. They did nothing and gave nothing on the faith of this release. A person who has given no consideration cannot, even though innocent, take advantage of a deed obtained by fraud: *Scholfield v. Templar (a)*. There is no authority for saying that if a party buys subject to a mortgage, he can, without giving any further consideration, avail himself of a release obtained by the fraud of his vendor. In such case, the vendor must be considered as the agent for the purchaser in the negotiation of the release; and the latter would, therefore, be affected by the fraud. The neglect of this Bank, in making none of the usual searches, disentitles them to the consideration of a Court of Equity: *Jackson v. Roe (b)*. "It would be against reason," says the Master of the Rolls, in *Hubbard v. Lyster (c)*, where there was a defence of purchase for value without notice, "to allow the protection of this plea to a purchaser who had wilfully relinquished the security which the statute has afforded him."

On the subject of notice, they cited *Sug. Ven. & Pur.*, p. 619, and the cases there referred to.

Mr. Serjeant *Lawson* and Mr. *Sullivan* (with whom were Mr. *Brewster* and Mr. *Romney Foley*), for the London and County Bank.

It is quite a mistake here to suppose that the Bank contracted with Sadleir for a security on these lands subject to Mr. Eyre's

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(a) 1 Johns. 135.

(b) 2 Sim. & Stu. 472.

(c) 7 Ir. Eq. Rep. 560.

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mortgage. If they did, their case would stand on different grounds from what it rests on. They contracted, as the deeds show, for a security on an unincumbered estate (save as to a specified mortgage). Sadleir covenanted that the lands were unincumbered, and for further assurance. As soon as the Bank, in the fair and regular completion of this conveyance, discovered the existence of this mortgage, they called on Sadleir, in pursuance of his covenant, to procure a release; and it was only on his express understanding to do so forthwith that the remainder of the money was paid. How can it be said that the Bank have not given their money for whatever Sadleir procured for them in pursuance of that undertaking? They are plainly purchasers of it for value. It is not necessary that the consideration in such a case should be paid to the person releasing: *Cobbett v. Brook* (a). The Bank, as is alleged by the appellant himself, held themselves altogether aloof from the dealings between Sadleir and Mr. Eyre; and, in that respect, their case is quite distinguishable from that of Templar, in *Scholfield v. Templar*. There, the misrepresentation was made with the concurrence (no doubt innocently) of the person who was to obtain the advantage by it. Then, immediately after the payment of the money, they were assured, by Mr. Eyre's known solicitor, with whom they had been in communication, that a release would be executed by Mr. Eyre; and on that assurance, and relying on the release, they remained quiescent ever after. It is impossible to say what their position might have been, with regard to these moneys, if Mr. Eyre had refused to release, and they had proceeded to call them in. They have, therefore, changed their position materially on the faith of his release. He knew well, through his solicitor, that the release was wanted to enable Sadleir to deal with other persons; and, if he intended that there should be any such condition attached to it, with regard to the validity of the new securities, as suggested at the Bar, he should have so expressly stated at the time. Is it to be supposed that everyone taking lands released under a proviso, such as was in Mr. Eyre's deed, is bound to see to the title of the substituted securities? As for negligence, it is Mr. Eyre's own negligence, in taking this

(a) 20 Beav. 524.

great amount of shares without asking a single question at the Railway office, which has caused all the difficulty.

They referred to *Staunton v. Verney* (a); *Joyce v. De Moleyns* (b).

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THE LORD CHANCELLOR.

The question in this case turns not upon the point of registry search, or upon the fact of notice of the incumbrance itself. It comes simply to this; if these Bankers have given consideration for what they derive under this instrument, unless you show that they had notice of the fraud in question, or that they were concerned in the misrepresentation, what case do you make against them? That distinguishes their case from the case in *Johnson's Reports*. Here, the London and County Bank had no notice whatever of the fraud; they are not parties in any way to the misrepresentation; and the sole and single question then is, have they given consideration for what they got by virtue of this deed? What they got was a discharge of the incumbrance from the estate which they bought. They gave consideration for the contract to effect that discharge, and for the covenant for further assurance by John Sadleir, and all deriving under him, including Mr. Eyre. This agreement is carried out. The consideration comes down to the completion of the transaction; and it is impossible to say that the consideration does not run through the whole of it. Unless they can be fixed with fraud or misrepresentation prior to the execution of the deed, their position is unaffected. It would be inequitable in the highest degree to take from them the protection which they got, in innocence of the frauds, and upon the faith of which they paid their £95,000. The judgment of the Court below must be affirmed, and with costs.

Judgment.

THE LORD JUSTICE OF APPEAL.

The grounds of my opinion, that the order of Judge Longfield should be affirmed, have been partly stated in the course of the argument. They are very few and simple. The London and

(a) 2 Ed. 81, 85.

(b) 9 Ir. Eq. Rep. 576; S. C., 3 J. & L. 698.

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County Bank are purchasers for value under this deed. They advanced £95,000 on the mortgage executed to them by John Sadleir, purporting to convey to their trustees the lands free from incumbrances. The money advanced by the Bank was the consideration as well for the conveyance of the lands as for the protection which the covenant of the deed bound John Sadleir to afford, whenever it was found to be necessary. It was in substance and effect a remedy for restoring to the Bank as much of the money as should be equivalent to any undiscovered incumbrance, if, when discovered, John Sadleir failed to have the estate discharged from it. This was a continuing right on their part, and an obligation on him quite independent and irrespective of the time, whether earlier or later, that the £95,000 should be advanced. When, therefore, the incumbrance of Mr. Eyre was discovered, the liability of John Sadleir to have it released, or to pay an equivalent in damages, became immediate and absolute. To discharge it, he applied to Mr. Eyre, who declined to be himself the medium of negotiating the proposed substitution of other security for that he was asked to relinquish, and committed the whole affair to his solicitor. In the deception practised on him, and the consequent loss incurred by Mr. Eyre, there is no pretence that the Bank participated; they required only what they were entitled to, a release; and John Sadleir, under the obligation of his covenant, obtained it for them, thus performing one alternative, and avoiding the other, of making them restitution or compensation in damages. The act of John Sadleir was only what he was legally bound to do. The fraud he practised to accomplish it was wholly unknown and unsuspected by the Bank, and, as purchasers, they have obtained what they were entitled to, and have paid for, and have an indisputable right to retain.

*Order.*

It is ordered by this Court that the petition of appeal be, and the same is hereby, dismissed with costs; and, accordingly, it is further ordered that the order of the Landed Estates Court, bearing date the 31st day of October 1859, be, and the same is hereby, affirmed. And it is further ordered that the deposit of £10 lodged with the Registrar

be paid to the said John William Burmester, William Cory, and James Andrew Durham, in part payment of such costs. And it is further ordered that the said appellant do pay to the said John William Burmester, William Cory and James Andrew Durham their further costs of this appeal, beyond the sum of £10, when same shall be taxed and ascertained.

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*Court of Appeal Hearing Book, f. 371.*

In re the Estate of GEORGE JOHN LANAUZE.

1859.  
*Nov. 22.*

THIS was an appeal, on behalf of the owner, from an order of Judge Longfield in the Landed Estates Court, ruling that certain legacies bequeathed by the will and codicil of John George Lanauze were charged upon the lands sold in this matter.

John George Lanauze, appellant's uncle, was, in his lifetime, pos-

A testator devised all his estate in a certain chattel leasehold interest in lands, and "all other my property and worldly estate what-

ever," to a trustee, upon trust, in the first place, to preserve the said chattel interest by payment of head-rent and renewal fines. He then bequeathed certain pecuniary legacies, and, among others, a sum of £100 to the trustee; "and as to, for and concerning all the residue of my interest in my said lands, and as to, for and concerning the residue, similarly, of my other personal estate and effects, subject to the hereinbefore trusts, I hereby give, bequeath and devise all such residue of my interest in the said lands, as also all such the residue of my personal estate and effects, in trust for my eldest son." The testator then charged the lands and the residue of his personal estate with certain sums for younger children. The testator then declared that, in case he should die leaving no son, but leaving an eldest or only daughter, then he devised all his interest in said lands, and all the residue of his personal estate, in trust for such daughter, with remainders over; and he directed "that all the intermediate rents and profits of my said lands, as well as of the residue of my said other personal estate and effects, which shall accrue, arise or be made out of both said funds," subject only to the provision made for testator's wife by their marriage settlement, and to his debts and funeral expenses, "and to the several legacies hereinbefore enumerated," should go to the trustee. In 1846, Master Henn had made a report, afterwards confirmed by a decree in Chancery, by which he found that the legacies under the will were not charged upon testator's interest in the lands.—*Held*, that, upon the true construction of the will, the legacies were not charged upon the lands.

*Held also*, that the legatees were bound by the Master's report.

The Judges of the Landed Estates Court are bound by a final decree of the Court of Chancery.

*In re Kelly* (9 Ir. Chan. Rep. 108) commented on.

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essed of a chattel leasehold interest, under the Bishop of Kilmore, in portions of the lands of Kildrumfartin and Kilnaleck, subject to a moiety of a yearly rent reserved thereout. By his marriage settlement, dated the 25th of April 1832, he assigned to the trustees therein named the lands of (amongst others) Kildrumfartin and Kilnaleck, and all his estate and interest, benefit of renewal, claim and demand whatsoever, in and to the same, upon trust (subject to the payment of the rent and renewal fines, and to a life estate for himself) that, in the event (which actually happened) of his own death in his wife's lifetime, and of the death of all the issue of the marriage unmarried and under age, then the wife should take a certain annuity out of the lands during her life, and, immediately upon his death in his wife's lifetime, then upon trust, subject to the wife's annuity, for such persons as he should by deed or will appoint.

John George Lanauze subsequently made his will, dated the 19th of February 1834, whereby, after confirming to his wife the provision made for her by the deed of settlement, he devised all his interest in the lands of Kildrumfartin and Kilnaleck, and certain other lands called Tonelyon and Coolkill, to his trustee and friend William O'Reilly, his executors and administrators, upon trust, "First, that he (and, during the continuance of this present trust they also) shall, from time to time, and at all times necessary, preserve my interest in all my tenant rights, by duly paying the head-rent due by me, and coming out of all my lands, to the proper landlords able to give good acquittances for the sum and sums respectively paid to them on the account of such head-rent; and, secondly, that he and they, my said trustees, shall duly pay and satisfy, to the proper persons, all fines which shall have become due to, and remained claimable by, such persons respectively, for entitling my said trustee and trustees to obtain renewal or renewals of the interest in any of my said lands; and that also they shall duly pay all impositions, taxes and duties, of what degree or nature soever, lawfully and accustomarily levied out of all or singular my said lands, and likewise all other necessary and usual burdens affecting the same; and, as a mark of my willingness to invite the said William O'Reilly to make this trust not unworthy of his acceptance,

I empower him to take and receive, from each and every one of my tenants of my lands, or to retain for his own use, as fees for receiving my rents, the sum of one shilling for every pound sterling paid as rent by each one of my tenants. I nominate, constitute and hereby appoint my said friend William O'Reilly to be sole executor of this my last will and testament; and I hereby give and bequeath unto him a sum of one hundred pounds sterling, as a mark of my confidence and faithful regard: also to my friend Edward Plunkett, of Dunowen, I give and bequeath the sum of two hundred pounds sterling. I give and bequeath to Peter Keogh, a servant now employed in my business, a sum of thirty pounds sterling. I give and bequeath to Mathew Cumisky, my maternal uncle, a sum of one hundred pounds sterling; and as to, for and concerning all the residue of my interest in my said lands, and as to, for and concerning the residue, similarly, of my other personal estate and effects, but still subject to the hereinbefore trusts by this my last will declared, I hereby give, bequeath and devise all such residue of my interest in said lands, as also all such the residue of my personal estate and effects, in trust for my eldest and yet unborn son, his executors and administrators; but I charge hereby the said lands, and the said residue of my said other personal estate and effects (if, besides such eldest son, I shall have also a younger child who shall be living after my death), with the sum of five hundred pounds for such younger child; and, if I shall beget two such younger children, I hereby charge my said lands, and my said residue aforesaid, with the sum of eight hundred pounds, the same to be equally divided, share and share alike, between them, when payable under this my will. And, if I shall leave me surviving more than two younger children besides an eldest son, then (whatever may be the number of such younger children above such two) I charge my said interest in the said lands, and the residue of my said other personal estate, with the sum of one thousand pounds sterling, the said sum to be divided, share and share alike, amongst such younger children, being more than two in number, when their legacies shall become demandable and payable to them under this my will; and, moreover, I mean, order and direct that, in the event of my leaving two

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such younger children, as herein aforesaid, as only issue, besides an eldest son, the share or legacy so meant for either of them dying unmarried and under the age of twenty-one years shall go over and survive to the other of them such two younger children ; but it is, notwithstanding, my will, and I hereby also ordain that, in the event of my younger child or children so dying unmarried and under full age (when the number of such younger children shall be more than two), no surviving younger child shall, by the death of any one or more of them, under such full age and unmarried, be entitled to receive, in any manner, more than the sum of five hundred pounds ; but any possible surplus above such five hundred pounds, for any such child as last mentioned, shall not be raised, but shall sink in my interest in said lands for their relief and ease. And further, if it happen that I shall die leaving no son, but shall die leaving an eldest or only daughter, then in trust, as to all such my interest in the said lands, and all the residue of such my other personal estate and effects (charged in like manner as herein aforesaid), for such eldest or only daughter, her executors and administrators ; and, if I shall leave no daughter me surviving, or if all daughters me surviving shall happen to die severally under the age of twenty-one years and unmarried, then, and in such event, I give, bequeath and devise my interest in my said lands, and all the residue then remaining unadministered of my said personal estate and effect, to my nephew George Lanauze (the appellant), eldest son of my late brother William George Lanauze, deceased, when and so soon as my said nephew George Lanauze, aforesaid, shall attain the age of twenty-one years ; but, if he the said George Lanauze shall die without legally attaining such age, then I give and devise my interest in my said lands, as also all the residue of my said other personal estate and effects, to that child, be it male or female, of my first cousin George Lanauze (now residing in the East Indies), son of the late Andrew Lanauze, of Carrigan, in the county of Cavan aforesaid, who shall first attain the full age of twenty-one years ; but I will, at the same time, and direct hereby, that all the intermediate rents and profits of my said lands, as well as of the residue of my said other personal estates and effects, which shall accrue, arise or be

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made out of both the said funds during all the period, number of years and time which shall intervene between my said nephew's first becoming the next devisee of my said property, by virtue of this my will, until such his death (if he shall so chance to die under the age of twenty-one years, as lately supposed), and also all the intervening profits of the same lands, and of all the residue of my said other personal estates, deriving, intervening or in any manner accruing between the time of the death under age of my said nephew George Lanauze, and the coming to the age of twenty-one years as aforesaid of the eldest child of my said first cousin George Lanauze, now residing in the East Indies, that all the said profits, subject only to the provision made for my said wife, Elizabeth Lanauze, by the said deed of settlement so executed upon, or previously to, our marriage, and to my debts and funeral expenses, and to the several legacies hereinbefore enumerated, shall go and belong to, be retained, taken and recovered by the said William O'Reilly, to and for his proper use and benefit." Then followed a provision, empowering the trustee to make leases during the minority of such person as should, for the time being, be entitled under the will to the lands thereby devised.

The testator made a codicil to his will, dated the same day, whereby, in addition to the legacies bequeathed by the will, he bequeathed £60 to George Hines.

The testator died on the 16th of January 1837, leaving his widow, Eliza Lanauze, afterwards the wife of Charles Malone, and one only child, a daughter, Mary Anne Lanauze, who was thereupon entitled, under the will, to said leasehold interest in the lands.

On the 5th of February 1842, an order in Chancery was made, in the matter of Mary Anne Lanauze a minor, whereby it was referred to the late Master Henn to take an account, amongst other things, of the debts, legacies and funeral and testamentary expenses of said testator, and of the charges and incumbrances affecting his property. Under the order of reference, four of the legatees, namely, William O'Reilly, Edward Plunkett, Peter Keogh and Mathew Cumiskey, filed charges, claiming their respective legacies; but George Hines did not put forward any claim. Charles and Eliza Malone, on

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behalf of the minor, denied the fact of said several legacies being any charge or lien on said lands of Kildrumfartin and Kilnaleck, or the income thereof.

On the 5th of November 1847, the Master made his report, and thereby stated that he had examined into the matters referred, in the presence of the respective claimants; and the Master thereby found, amongst other things, several judgment and other debts affecting the testator's property, and also that the principal and arrear of interest were due in each case of the legacies, except that of George Hines, inasmuch as no claim had been laid before him in regard thereto; and the Master directed the surplus of all future rents to be applied in liquidation of testator's debts, the several legatees under the will not being, in his opinion, entitled to any portion of said rents.

The several legatees took objections to the Master's report, which was, notwithstanding, confirmed by an order of said Court of Chancery, of the 10th of July 1848, in the same matter, made upon due notice to all of the said legatees, none of whom intervened on the occasion, or ever took any further proceedings for the purpose of disputing the decision of Master Henn, or took any steps whatever for recovery of their respective legacies, until after an absolute order for sale of the said lands had been made in the Incumbered Estates Court.

The minor, Mary Anne Lanauze, died on the 24th of February 1851, under age and unmarried, whereupon the bequest in petitioner's favour came into effect.

After the death of the minor, her mother, Eliza Malone, continued in possession of the lands, and in receipt of the rents and profits, in derogation of the appellant's rights; who, on the 2nd of June 1853, filed a cause petition against Eliza and Charles Malone; and, by a decretal order in the cause of *Lanauze v. Malone*, dated the 2nd of December 1855, the petitioner was declared entitled to the lands. The appellant entered into possession, and, on the 25th of November 1856, filed his petition in the Incumbered Estates Court for a sale of said lands, for discharge of the incumbrances affecting them. The lands were sold on the 18th of January 1859; and, on

the settling of the final schedule, Judge Longfield made an order, declaring, amongst other matters, that the legacies bequeathed to William O'Reilly, Peter Keogh, Matthew Cumiskey and George Hines were charged upon the lands sold in the matter; and it was ordered that the legacies should be paid, with the arrears of interest for six years prior to the filing of the petition.

From this order the present appeal was now brought, upon the ground that, upon the true construction of the will of John George Lanauze, the legacies in question were not charged upon the testator's chattel interest in the lands; and also, upon the ground that the legatees were bound by the report of Master Henn, confirmed by the decree of 1848.

Mr. *Brewster*, Mr. *J. E. Walsh* and Mr. *Tudor*, for the appellant.

It is admitted that, if a testator makes a common fund of his real and personal property, and, after bequeathing legacies, then bequeaths the residue of the whole common mass, every portion of that mass is subject to the legacies. But the testator, in the present case, has adopted an entirely opposite course; for he has carefully kept the two funds distinct throughout the entire will. In such a case, a money legatee cannot have recourse, for payment of a legacy, to a chattel real specifically devised: *Davis v. Gardiner* (a). The testator here had a perfectly legitimate reason for dividing his property into two classes, and keeping them distinct. He had already, by his marriage settlement, made provision for his wife, but not for children, and he was now by his will about to provide for his child; and it is not likely to have been his intention that his child should not have his chattel interest in the lands until the legacies had been satisfied out of it, a course which might have left her penniless. But this matter was in fact *res judicata*. The report of Master Henn in 1846, confirmed by the decree of 1848, was the decision of a Court of competent jurisdiction, by which the parties are now bound.

Mr. *Sherlock* and Mr. *Hamill*, for Myles William O'Reilly, the personal representative of the executor.

(a) 2 P. W. 187.

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Mr. *F. Walshe* and Mr. *Purcell*, for George Hines, one of the legatees, and—

Mr. *John H. Richards*, for another legatee.

The legal intention of the testator was to charge the legacies upon his interest in the lands: *Greville v. Brown* (a); *Scott v. Clements* (b). Master Henn's report is not an estoppel. If the Judge in the Landed Estates Court thought the decision of the Master erroneous, he was not bound by it, nor are his legatees: *In re Kelly* (c).—[The LORD JUSTICE OF APPEAL. That was the case of a decree *pro confesso*.—The LORD CHANCELLOR. It would be the most inconvenient thing possible if, after a report such as that made by Master Henn in this case, the parties come forward now to establish their claims].

The LORD CHANCELLOR.

Judgment.

In my opinion, it is very plain, on the construction of this will, that the legacies are not charged upon the chattel interest, which has been specifically devised. This was a particular case. The testator was possessed of a chattel interest in land, and also of other property of a purely personal character; and he devised the chattel interest specifically, for a distinct purpose, in the first instance, and then he devised the rest to a trustee, William O'Reilly, upon trusts which he specified; and the very first of those trusts was, not to administer all the property in one common fund, but to preserve all his interests in his tenant rights, by payment of head-rent due by him, and to pay the renewal fines, and all taxes and duties levied out of the lands, and so on. He then gives the trustee £5 per cent. on the rents received by him, thereby showing that he meant him to possess this chattel interest free from the legacies. Having done that, he then nominates the same William O'Reilly his executor, and gives him a legacy of £100, as a mark of his confidence and regard, and he then bequeaths the legacies now in question. Now, if the other legacies were charged on the chattel interest, so was the legacy bequeathed to O'Reilly; and it certainly would have been a

(a) 5 Jar., N. S., 849.

(b) 8 Ir. Chan. Rep. 1.

(c) 9 Ir. Chan. Rep. 103.

strange inconsistency on the part of the testator to direct O'Reilly to preserve the chattel interest in the way the testator has directed, and then to give him a legacy charged on that same chattel interest, which would enable him to sell the property for the payment of that legacy. All through his will the testator has taken care to keep a distinct line between his chattel interest and the rest of his personal property. He then devises the residue of his property in the following way:—"And as to, for and concerning all the residue of my interest in my said lands, and as to, for and concerning the residue similarly of my other personal estate and effects, but still subject to the hereinbefore trusts, by this my last will and deed, I hereby give, bequeath and devise all such residue of my interest in said lands, as also all such the residue of my personal estate and effects, in trust for my eldest and unborn son;" but he charges "the said lands, and the said residue of my said other personal estate and effects" with certain charges for younger children, which charges he calls legacies. Now, if the testator supposed that the legacies given by his will would have been charges on the chattel property, there would have been no need for him to give this specific direction as to the charges or legacies for his younger children. There is not a single clause in this will making this chattel interest into a common fund. Master Henn's decision is an authority for the opposite view. I am, for my part, quite satisfied to abide by the older decision of the officer of this Court, although it does happen that a Judge of the Landed Estates Court has come to a different conclusion. It is said that the decisions of the Court of Chancery in minor matters are not binding. Perhaps that may be true, in a certain sense, inasmuch as the minor would not be bound, if he did not choose to adopt the decision. Lord Manners refused, *In re Burke a minor* (a), to allow executors, *on motion*, to account before the Master for property which the testator had bequeathed to minors, on the ground that the account so taken would not be binding on the minors, there being no suit pending in Court to which they were parties. But, if the minor does adopt such decision, it then, I apprehend, becomes binding upon all parties; and, unquestionably, where parties have

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(a) 1 B. & B. 74.

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thus come before the Master, and have acquiesced in his decision, which the minor has also adopted, it would require a strong authority to induce me to hold that they are not bound thereby.

It has been urged that the Judges of the Landed Estates Court have power to investigate a decree of the Court of Chancery, and to refuse to act upon it, if they come to the conclusion that it was erroneous; and the decision in *Kelly v. Kelly* (a) has been cited in support of that proposition. *Kelly v. Kelly* does not decide any such thing, and, if any idea to that effect exists, the sooner such an idea is dispelled the better. The decree in *Kelly v. Kelly*, in the Court of Chancery, was a decree *pro confesso*, which is always of an *ex parte* character; moreover, it was a decree for a receiver; but no sale of the lands was ordered. The Commissioners of the Incumbered Estates Court had full power to construe that decree, and that was all they did; it was merely the case of putting a construction on a decree. The LORD JUSTICE OF APPEAL, in his judgment, confined himself to that point. There is a great deal of other matter in the report, which may perhaps be considered as extra-judicial, and by which I certainly should not feel myself bound, if it means that the Judges of the Landed Estates Court have authority to examine and go behind a final decree of the Court of Chancery. The 42nd section of the Incumbered Estates Court Act (12 & 13 Vic. c. 77) plainly shows that where there is a final decree of the Court of Chancery, which would be binding on the parties in this Court, that decree would be equally binding on the Commissioners of the Incumbered Estates Court. I do not think that, upon such a decree of the Court of Chancery, any question can even be raised in the Landed Estates Court, except for the purpose of construing that decree; and I am quite sure that, in *Kelly v. Kelly*, the Commissioners of the Incumbered Estates Court did not mean to do anything more. The ruling of the Court below must be reversed.

THE LORD JUSTICE OF APPEAL.

I entirely concur in the construction which has been given to the

(a) 9 Ir. Chan. Rep. 103.

will by the LORD CHANCELLOR; and I shall only add that, with respect to the case of *Kelly v. Kelly*, all that was done by the decree of the Court of Chancery was to appoint a receiver, and the Incumbered Estates Court construed that to be a decree for a sale. This Court merely reversed the construction which the Commissioners of the Incumbered Estates Court had given to the decree of the Court of Chancery.

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*Judgment.*

In re HARDING'S ESTATE.

1860.  
*June 7.*

By indenture of 20th of July 1765, Theobald Wolfe demised to William Harding the lands of Derryhiney otherwise Castlefarm, at a yearly rent, for three lives renewable for ever.

By deed of 20th of July 1769, made between the said William Harding and Henry Harding his eldest son, of the first part, George Harden and Anne Harden his daughter, of the second part, William Harden and Thomas Gee, of the third part, being the settlement executed on the marriage of said Henry Harding with said Anne Harden, said William Harding (among other things) granted a perpetual yearly rentcharge of £134 of the then currency of Ireland, to be issuing and payable out of said lands.

The petition of appeal stated that this deed was not forthcoming, and could not be procured, notwithstanding diligent search; but that it appeared, from the memorial thereof, that William Harding, for the considerations therein mentioned, had granted and confirmed unto William Harden and Thomas Gee (trustees), for the uses and purposes in said deed mentioned, a yearly rentcharge of £134, for ever, to be issuing out of the said lands.

By deed of 1769, A granted a perpetual yearly rentcharge of £134, payable out of certain lands beld by him for three lives, perpetually renewable. That deed was lost; but it appeared, from a memorial thereof, that A had granted to B and C, for the uses mentioned in the deed, a yearly rentcharge of £134, for ever, issuing out of the said lands. The rentcharge was paid by the owners of the lands from 1769 down to 1860, when a petition was presented to the Landed

Estates Court for a sale of the rentcharge.—*Held* (overruling a decision of a Judge of the Landed Estates Court), that the memorial, coupled with evidence of the payment of the rentcharge down to 1860, was sufficient evidence of a perpetual subsisting rentcharge, so as to enable the Court to sell.



1860.  
*Ch. Appeal.*  
*In re*  
 HARDING.  
 Statement.

William Harden, one of the trustees in the deed of 1769, died on the 11th of August 1779, and Thomas Gee, the other trustee, died in 1785.

By articles of agreement, dated the 9th of July 1792, and executed on the marriage of William Harding, the eldest son of said Henry Harding, with Miss Elizabeth Holmes, made between said George Harden, of the first part, said William Harding, of the second part, said Elizabeth Holmes, of the third part, and Peter Holmes, jun., Alexander Holmes, Samuel Middleton and William Poe, of the fourth part, it was, among other things, recited, that said William Harding was entitled to said rentcharge, which, was therein described as "the perpetual rentcharge of £134, chargeable and issuing out of said Castlefarm of Derrihiney;" and same was, with certain lands therein mentioned, settled to the use of said William Harding for life, with remainder, subject to a jointure of £200 a-year for said Elizabeth, to the use of William Poe and Samuel Middleton, for a term of 200 years, the trusts of which term were thereby declared to be to raise, in the manner therein mentioned, a sum of £2000, as portions for the younger children of said marriage. There was issue of this marriage an eldest son, George Harding, and eight younger children, of whom the appellant was one.

William Harding, who was the grantor of said rentcharge, and owner of said lands whereon same was charged, and who regularly paid said rentcharge during his life, by his will, dated the 13th day of March 1773, devised all his estate in said lands to his second son, Jonathan Harding, and died previous to the year 1777, leaving said Jonathan surviving, who thereupon entered into possession of said lands, and thenceforth during his life regularly paid the rentcharge. He died in 1815, leaving Jonathan Harding his eldest son and heir-at-law, who thereupon entered into and continued, and was at the time of this appeal, in possession and receipt of the rents and profits of the lands, and had regularly paid the rentcharge. By his marriage settlement, dated the 18th of July 1816, the lands in question were conveyed to the use of Jonathan Harding for life, with remainder, subject to a jointure, to the use of the issue of the

marriage, in such shares and proportions as he should by deed or will appoint.

1860.  
*Ch. Appeal.*  
*In re*  
HARDING.  

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*Statement.*

By deed of appointment, dated the 27th day of March 1834, which recited the last mentioned settlement, and the power given thereby, Jonathan Harding appointed one undivided third part of the lands to the use of Frances Harding, his daughter, and her heirs, for ever, and thereby declared and appointed "that the only incumbrance to be paid out of said third part of said lands thereby appointed shall be, one-third of an annuity or yearly rentcharge of £134 late currency, now affecting and charged on said lands." The rentcharge had thus been regularly paid by the owners of the lands from the year 1769.

From the year 1777 to the year 1815, the lands were held by Jonathan Harding, second son of William Harding, the lessee in said lease, and grantor in the deed of 1769, as owner in *quasi* fee, and were not, during that period, affected by settlement, but descended to his eldest son, Jonathan Harding, as his heir-at-law.

A petition having been presented by Peter Holmes Harding, the appellant, to the Landed Estates Court, for sale of the rentcharge, for discharge of the incumbrances affecting it, Judge Dobbs, on the 14th day of May 1860, made an order declaring that there was not sufficient evidence that the rentcharge of £134 was then a subsisting rentcharge, inasmuch as the memorial of said deed was the only evidence of its contents laid before the Court; and it appeared that the rentcharge was not then a charge on the lands, having expired on the death of the survivor of the grantees, William Harden and Thomas Gee; and the Court declined to approve of the title to the said rentcharge as a good title, until further and sufficient evidence should be produced, that the same was then a subsisting rentcharge on said lands.

From this order Peter Holmes Harding now appealed; on the grounds, first, that the memorial of the deed of 1769 was good secondary evidence that a perpetual yearly rentcharge of £134 was granted by said deed, and was thereby charged on said lands. Secondly, that the memorial, coupled with evidence of the uninterrupted receipt of the rentcharge, from the execution of the deed of 1769 to

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 —  
*Statement.*

the time of presenting the petition, by the persons claiming under the deed, was good; secondary evidence of a perpetual rentcharge having been thereby created, and of such rentcharge being still subsisting.

*Argument.*

Mr. Serjeant *Lawson* and Mr. *E. M. Kelly*, for the appellant.

Under the 43rd section of the Landed Estates Act (21 and 22 Vic. c. 72) the Court had clearly jurisdiction to sell. The memorial of the deed of 1769, coupled with the evidence of payment of the rentcharge since then down to the present time, made by parties whose interest it was to resist this claim, is ample evidence that it was a perpetual rentcharge, still subsisting. *Sadlier v. Biggs* (a) is in point. In that case, Lord Cranworth in his judgment said (p. 455):—"It appears to me that there are the most satisfactory circumstances tending to show what the rights of the parties are: these are, long enjoyment, the same dealing with the property for a very great period, during the whole of which it was the interest of one party to resist that which, nevertheless, he from time to time performed."

There was no appearance in support of the order of the Court below.

The LORD CHANCELLOR.

*Judgment.*

It is clearly a mistake to say that the memorial is the only evidence, for the payment of the rentcharge during so long a period is certainly evidence also. We are of opinion that there is evidence in this case for a perpetual subsisting rentcharge, quite sufficient to warrant the Court in selling. The order of the Court below must, therefore, be reversed.

The LORD JUSTICE OF APPEAL concurred.

(a) 4 H. L. C. 435.

1859.  
*Chancery.*

MALONE v. HARRIS.

(*In Chancery.*)

June 3, 8, 16.

THIS case came before the Court upon a cause petition and affidavits. The following were the material facts of the case:—By letters patent of the 15th of May 1820, made in pursuance of 26 G. 3, c. 57 (*Ir.*), the Crown empowered Henry Harris to establish a theatre in Dublin. Henry Harris proceeded to erect a theatre in Hawkins'-street in the city of Dublin; and by deed of the 4th February 1822, he assigned to William Moore and William Laurence Bicknell the Hawkins'-street premises and the letters patent, upon trust to secure the payment to George Bicknell of two annuities of £700 and £300 per annum respectively, which were therein granted. New letters patent were subsequently obtained, on the surrender of those of the 15th of May 1820, and the new patent and the Hawkins'-street premises were duly vested in Samuel Beasley and William Laurence Bicknell, in trust to secure the said annuities to George Bicknell.

On or about the 1st of November 1820, Henry Harris, in order to raise the sum of £10,000, proposed to issue fifty debentures for £200 each, such debentures to be chargeable upon the theatre, the patent, and the theatrical property, to carry interest at the rate of £3 per cent. per annum, and to confer on the holder of each debenture a right to a free ticket of admission, transferable at the commencement of each season. Many of such debentures were accordingly issued. In 1825, Henry Harris, by deed, conveyed all his interest in the theatre, &c., to trustees for the debenture holders. This deed contained a schedule of the debenture holders, amongst whom the petitioner was included as holder of one. In 1826, the petitioner purchased a second debenture, and received a certificate as entitled to the benefit of the two.

The owners of a theatre, by deed bearing date in 1839, made for valuable consideration, covenanted to confirm to certain debenture holders the privilege of free admission to the theatre. The petitioner was entitled, as one of the debenture holders, to the benefits of the deed of 1839, but subsequently lost his debenture. In 1851, the respondent became lessee of the theatre, with notice of the deed of 1839. — *Held*, that the petitioner was not entitled specifically to enforce against the respondent the privilege of free admission created by the deed of 1839.

*Statement.*

1859.  
*Chancery.*  
**MALONE**  
*v.*  
**HARRIS.**  
*Statement.*

On the 31st of May 1839, in consequence of difficulties which had arisen respecting the debenture holders, their rights and privileges, a deed was executed, of that date, between Henry Harris of the first part, the representatives of the said George Bicknell of the second part, the said Samuel Beasley and William Laurence Bicknell of the third part, George William Bicknell of the fourth part, John William Cole of the fifth part, and the debenture holders who should execute the same of the sixth part. The petitioner was one of the executing debenture holders. By this deed the debenture holders released all claims for interest on their debentures; and in consideration of this it was provided that the holders of debentures should have a right to free admission to the theatre for themselves, and should also have a right to issue certain tickets for free admission for others.

The respondent, John Harris, obtained a lease of the theatre from the representatives of George Bicknell, with full knowledge of the deed of 1839; and on the 24th of September 1854, he issued a circular by which he required the debenture holders to produce their debentures for inspection, in order that the names of the holders might be registered.

The petitioner alleged that he had lost his debentures, and was consequently unable to produce them. The respondent then refused to permit the petitioner to exercise any of the privileges of a debenture holder, and the petitioner brought an action in the Court of Queen's Bench against the respondent for such refusal, which, terminated in a verdict and judgment for the respondent. The petition prayed for a declaration that he was entitled to the two debentures and the privileges flowing from them, and that the respondent might be restrained from obstructing the exercise of the rights conferred by deed of the 31st of May 1839, on the petitioner, as a debenture holder.

*Mr. Hughes, Mr. Robinson and Mr. Purcell, for the petitioner.*

*Argument.*

We have no remedy at Law, considering the form of this deed and the title of Harris. The debenture or scrip itself could confer no

right of entry on anyone. *Taylor v. Watson* (a), as explained and modified by *Wood v. Leadbitter* (b), *Duke of Devonshire v. Eglin* (c), and *Powell v. Thomas* (d), show how the Court will assist a merely equitable right grounded on acquiescence. The respondent himself has never disputed our right, provided we produce the particular evidence of it which he requires. In the year 1839, great pains were taken by the then lessee, with whom the present respondent is in privity, to find the real owners of the debentures, and the petitioner's right was then admitted. There has been, therefore, a continued user of this right during all this time; and the respondent admits that on his purchase he knew of the claim, and of the deed of 1839, by which the owners of the legal estate in the theatre covenanted that the petitioner and persons situated like him should have a right of entering. Such a covenant will be enforced in Equity, whether at Law it runs with the land or not: *Tulk v. Moxhay* (e).

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*Chancery.*  
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*Argument.*

Mr. Brewster and Mr. Exham, contra.

In this case the question between the parties is concluded by the decision in the Common Law Court. The principle of *Tulk v. Moxhay* does not apply. That certainly does decide that, in a certain class of cases, this Court will give relief to a covenantee, without reference to the question whether at Law his covenant would run with the land or not: but these are all cases where there is a stipulation with the owner or lessee of certain property, that certain neighbouring property shall be or shall not be used in some particular way, as in that very case of *Tulk v. Moxhay* (f), where the agreement was to keep a square garden in a neat state; or the cases of *Whatman v. Gibson* (g), *Schreier v. Creed* (h), and *Mann v. Stephens* (i), where there were covenants respecting building. These depend on the injury to the covenantor being incapable of compensation by damages, and the right conferred being much in the nature

(a) 7 Taunt. 374.

(b) 13 M. & W. 838.

(c) 14 Beav. 530.

(d) 6 Har. 300.

(e) 2 Phil. 774; S. C. 18 Law Jour., Ch., N. S., 83.

(f) 2 Phil. 777.

(g) 9 Sim. 196.

(h) 10 Sim. 35.

(i) 15 Sim. 379.

1859.  
*Chancery.*  
**MALONE**  
*v.*  
**HARRIS.**  
*Argument.*

of a covenant. It is not, however, laying down the rule too broadly to say that where damages will compensate, as they will here, for the loss is only the price of admission, this Court will not interfere. The contract here is so merely personal, that it is not a case for specific performance: *Attorney-General v. The Sheffield Gas Consumers' Company* (a); *Keppel v. Bailey* (b); *Collins v. Plumb* (c).

The LORD CHANCELLOR.

*Judgment.*

The claim of the petitioner in this suit is not to realise a pecuniary demand. This has been expressly relinquished; the suit is altogether confined to the assertion of the right of free admission to the Theatre Royal for the petitioner and others, under his orders, by virtue of the deed of 1839, referred to in the petition. The respondent is not a party to this deed; he is not in privity with the petitioner, either by estate or by contract, and the petitioner has failed to establish his alleged right at Law, which has been disaffirmed in the action. His present demand is, therefore, consequent on the disaffirmance, not on the establishment, of a legal right. By the judgment at Law he is now concluded in the several matters which were expressly put in issue in the action; the findings of the jury and the judgment of the Court of Queen's Bench are matters of record, and not open to be controverted. How then could I declare the petitioner to be the owner and proprietor of the debentures, or make any other declaration of right, in defiance and denial of the judgment at Law? Supposing, however, that this barrier could be removed, and that, on the true construction of the deed of 1839, I might hold that the personal right of the petitioner was secured by covenant, can I say that this covenant is so binding in Equity on the present respondent that I could grant the relief sought by the petitioner?

It could not be said that there is to be found in this deed any covenant running with the land on which the theatre had been built. Has any equity been fastened on the premises by the lessors of the lease under which the respondent derives? In my

(a) 3 De G., M. & Gor. 320.

(b) 2 M. & K. 547.

(c) 16 Ves. 454.

opinion there has not; the privilege conferred, and the provisions by which such privilege is secured, are simply personal, and the respondent ought not to be bound by obligations which he has not contracted to fulfil. The cases which were cited on behalf of the petitioner, with a view to furnish a principle for my guidance, do not seem to me to be at all applicable to the facts of this case. In one of them, *The Duke of Devonshire v. Eglin* (a), there was a complete executed agreement, which had been made for valuable consideration, the benefit of which had been enjoyed for upwards of ten years, and one party could not be allowed to defraud the other of the advantage of the contract. Equity will sometimes mature partial into complete performance, and will not allow what has been done in good faith to be undone against good faith. Where the parties cannot be restored to their original relative position, neither party will be allowed to rescind the contract, against the will and to the prejudice of the other. Where part performance ought to be completed, complete performance ought not to be rescinded. The case of *Powell v. Thomas* (b) is open to a like comment. Indeed there is a class of cases well known, in which a person who may be said to have encouraged an act to be done cannot afterwards be allowed to interfere with the enjoyment of what he has thus deliberately sanctioned; he shall not derogate from the just and full effect of that acquiescence, which must be supposed to have been intended, as it was calculated, to induce the doing of the act, which, when done, is complete and irreversible.

It occurred to me, after the case had been argued, that it was deserving of consideration whether the doctrine of *Tulk v. Mozhay* (c), and the cases of the same class, might not be applicable, and I brought these under the notice of the Bar, so as to afford an opportunity for any comment which might seem proper. I am well satisfied that a Judge should never decide a case on any ground not noticed at the Bar, nor on any authority which he may have discovered, without giving the Counsel in the cause the fullest opportunity of offering such observations as they think the matter may require. I derived much assistance from the

(a) 14 Beav. 530.

(b) 6 Hare, 300.

(c) 2 Phil. 774.

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*Judgment.*



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comment of Mr. *Brewster* on the class of cases to which I have just adverted, and to which exclusively he confined himself in the second argument which I heard. These cases establish this, that there may be an equity affecting the land and flowing out of a covenant, which, through the medium of notice, may affect the conscience of a party who would not be bound at Law by privity of estate or of contract. The reason of this rule of Equity is explained by *Lord St. Leonards* in the *Treatise on Vendors* (a).

In the well-known judgment of Lord Brougham, in *Keppel v. Bailey* (b), an instructive exposition is given of the doctrine of binding an estate by covenants; in connection with this, the valuable comment of *Lord St. Leonards* should be read. It is not by reason of notice simply and merely that a covenant is made to bind in Equity; there must be an equity so annexed to the land that the covenant becomes obligatory on the conscience of the proprietor of the estate. A party deriving under the proprietor, with notice of the covenant, will then be restrained by a Court of Equity from doing an act which would leave the party under whom he so derives exposed to an action for breach of the covenant, and especially so where, from its peculiar nature, damages would not afford an adequate remedy. But, in the present case, it may well be asked, where is the covenant in the deed of 1839, by which an equity is annexed to the premises demised to the respondent by the trustees?

The debentures originally issued were founded on a two-fold right. There was the repayment of the sum advanced, with interest in the meantime; there was the right of free admission to the theatre by tickets. This latter claim is what is now sought to be enforced. It originated in what was supposed to be the law, as decided in *Taylor v. Waters* (c), a case subsequently questioned on several occasions, but at last deliberately overruled by the well-considered decision of the Court of Exchequer in England, in *Wood v. Leadbitter* (d). The right of admission is but a license to enter on the premises of the licenser; there is not any grant of an interest

(a) Vol. 3, p. 485, 10th ed.

(b) 2 Myl. & K. 517.

(c) 7 Taunt. 374.

(d) 8 M. & W. 838; see also *Hewitt v. Isham* (7 Exch. 77).

in the subject of the license. It was stated by Mr. *Hughes*, on behalf of the petitioner, that his case would be concluded at Law by *Wood v. Leadbitter*. If so, where is his equity to be found? If this be a license to enter upon the premises, in which it grants nothing by way of interest, but is simply a license for pleasure, there is nothing to attach an equity to the premises in the occupation of the respondent. I agree with Mr. *Hughes*, that at Law a license only has been conferred or secured under the covenant of Mr. Bicknell. It purports to be assignable; but it seems to me neither to be assignable nor transferable. In *Shepherd's Touchstone* (vol. 1, p. 239) it is said:—"Licenses and authorities are grantable at first for the lives of the parties, or for years; but the grantees of them cannot assign them over." In accordance with the decision of *Taylor v. Waters*, it was supposed that the privilege would be quite as lasting as the debentures, and might be as readily transferred; and the deed of 1839 deals with this privilege as a right *in perpetuo* belonging to the debenture holder, his representatives and assigns. There is a case in the *Year Book*, 11 Hen. 7, f. 86, which is cited in *Wickham v. Hawker* (a), in which it is said, of a license to a man and his heirs to come and hunt in the park of a licenser, that this must be by deed, "for a thing passes by the license which endures in perpetuity." But, in *Com. Dig.*, tit. *Chase* H, 1, it is shown, by a reference to *Manwood's Forest Law*, that such a license implies a right to killing and carrying away the game which might be hunted, and thus, in reference to the subject-matter of the license, it is coupled with an interest. In the present case, there seems to be nothing on which the license can operate so as to confer an interest in the subject-matter. It is simply a right of free entry for pleasure, granted for pecuniary consideration; and so the case is governed by *Wood v. Leadbitter*, and especially as that case is explained in *Taplin v. Florence* (b). The distinction should always be noted between a mere license and a license either expressly or impliedly coupled with an interest. A further distinction is important, between a license to do an act on the land of the licenser, which should be granted by a deed, and a license to do an act on the land of the party to whom such license is given, which act he might have

(a) 7 M. & W. 79.

(b) 10 C. B. 744.

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*Judgment.*

done without the license, were it not for some easement connected with the property of the party who has given the license. The general rule is that such a license, though given by word only, when acted on cannot be revoked; but in anywise, where the withdrawal or revocation of the license would amount to a fraud on a licensee, a Court of Equity will interfere. A license may confer a right in the nature of an easement; and, in the learned treatise of Messrs. *Gale & Whatley*, p. 10, it is stated that "Many personal rights which, in their mode of enjoyment, bear a great resemblance to easements, as, for instance, rights of way, may be conferred by actual grant, independently of the possession of any tenement by the grantee; but such rights, though valid between the contracting parties, do not possess the incidents of an easement. In case of disturbance of a personal right thus given, the remedy would appear to be upon the contract only." The case of *Calcraft v. West (a)*, which relates to this theatre in some degree, sustains the proposition that, as a licensee, the petitioner has no *locus standi* in a Court of Equity.

It was admitted, by the Counsel for the petitioner, that no precedent could be found for the relief sought under such circumstances. I would not be deterred by the absence of precedent, if I could discover a principle clearly established, and capable of being safely applied to the admitted facts before me. But I think it would be without precedent, and against principle, to give the relief required by the petitioner, who must resort to the covenant in the deed of 1839 for whatever relief he can obtain; in this Court, I can give him none.

It is not necessary to advert to other views of the case, nor to say whether the respondent might not resist this claim, as in substance a suit for specific performance; or on the ground of the great inconvenience and hardship to which he might be exposed, if such a claim as that which has been put forward by the petitioner should be allowed.

On the broad principles which I have stated and explained; I think I am bound to dismiss this petition; and of course I dismiss it with costs.

(a) 2 J. & L. 123.

*Reg. Lib. 25, f. 51.*

1860.  
*Chancery.*

DALY v. THE ATTORNEY-GENERAL and others.

June 15.

THE Rev. Skeffington Preston, by his will, bearing date the 16th day of June 1843, after reciting that he was possessed of certain bonds for the respective sums of £1428 and £1500, and of a sum of £4000 old £3½ per cent. Government stock, gave and bequeathed the said securities, and all money due thereon, to James Daly, afterwards Lord Dunsandle, and the Hon. Bowes Daly, on trust, to pay the yearly income thereof to the testator's two sisters, share and share alike, during their lives, and to the survivor of them during her life; and, after the death of the survivor, he declared that the pecuniary legacies in his will mentioned should take effect (save some small pecuniary legacies, which were to be paid within six months after his decease). He then bequeathed to Bowes Daly £2000 of the said stock; and he left and bequeathed, for the use of the Protestant school belonging to the parish of St. Peter's, in the city of Dublin, the sum of £1000 of said stock; and he left and bequeathed, "for the use of the Protestant school attached to the Episcopal chapel in Upper Baggot-street, Dublin, the sum of £1000 of said stock." And all the remainder of his property he gave and bequeathed to his sisters, and the survivor of them, for life; and, after the decease of the survivor, he gave it to Bowes Daly; and he appointed the said Bowes Daly and James Daly executors of his will. On the 23rd of January 1844, the testator died; and the said will was afterwards duly proved by the executors. It appeared that there was, at the testator's death, and had been for a long period previously, and continued to be at the time of the filing of this petition, a Protestant school, for the education of the parishioners of St. Peter's parish, in connection with the parish church of St. Peter's. There was also an asylum or institution in Upper Baggot-street, for the reception of penitent females, and, in connection

A testator, being possessed of £4000 stock, bequeathed £2000 of it to an individual. £1000 of the remainder he bequeathed for the use of the Protestant school of St. Peter's parish, and another £1000 for the use of the school attached to the Episcopal chapel in B.-street. The chapel in B.-street had no school attached to it. B.-street was in St. Peter's parish.—*Held*, that, with regard to the second £1000, the will showed a general charitable intention, which might be executed *cy pres*, in favour of Protestant schools in St. Peter's parish; and it was referred to the Master to settle a scheme accordingly.

The costs, down to and including the hearing, ordered to be paid out of the residue; the costs of the reference to be borne by the fund.

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therewith, an Episcopal chapel; and it appeared that the testator was in the habit of attending Divine Worship at that chapel. There was another Episcopal chapel in Baggot-street. This chapel, and the institution with which it was connected, were vested in certain trustees, under the provisions of a certain deed of trust, bearing date the 18th day of February 1835. The institution was supported partly by subscriptions, and partly by the pew-rents of the church, but principally by the industry of the inmates of the institution. No school, in the proper sense of the term, was attached to or connected with the chapel or institution.

The present petition was filed by Mr. Bowes Daly (Lord Dunsandle having died), submitting that the bequest for the use of the Baggot-street school failed, for want of an object; and that the sum of £1000 intended for it was not devoted to general charitable purposes, and that, therefore, it fell into the residue bequeathed to Bowes Daly; and praying the decision of the Court, and that the trusts of the will, so far as concerned the two sums of £1000, might be performed. The respondents named were the trustees of the Baggot-street institution, the incumbent of the parish of St. Peter's, and the Attorney-General.

Mr. *Brewster* and Mr. *George May*, for the residuary legatees.

*Argument.*

On the statement of the trustees of the institution in Upper Baggot-street, there does not exist any such charity as a Protestant school attached to their chapel. Considering what a school is, it would be too great a stretch of language to hold that this establishment for the benefit of a certain class of females could be deemed a school. It cannot be so described, if there be not an organised system of teaching or teachers attached. It is not possible to say, therefore, that this establishment is within the scope of the bequest or the terms of the will. Then the question is, whether the bequest fails altogether, or can be worked out by this Court, *cy pres*, on the doctrine that a charitable bequest will not be allowed to fail for want of an object; but the rule is established, that that can only be done where the testator appears to have had a general intention to make a charitable bequest, and that, when he seems only to have had a

particular charity in view, if the bequest is for any reason invalid, the legacy lapses. The mode of the gift here makes no difference; the sums being all specifically appropriated, it is as if he had made different bequests of £1000 each. It makes no difference, his having put them together in the first instance: *Attorney-General v. Hurst* (a); *Attorney-General v. Golding* (b); *Carberry v. Cox* (c); *Attorney-General v. Ironmongers Company* (d). Of course, as the rest of the estate is in no way involved in this question, the costs of this matter, relating exclusively to this fund, must be borne by it.

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Mr. R. R. Warren and Mr. Franks, for the trustees of the Protestant Episcopal chapel in Upper Baggot-street.

This institution may fairly be deemed a school. It is a house for discipline and instruction; at any rate there is enough to show that this bequest ought to be carried out as a charity; and, if so, the Court will give it to this institution: *Loscombe v. Winteringham* (e); *In re Clergy Society* (f); *Hayter v. Tregoe* (g). As for the costs, the invariable rule is, that the residuary legatee bears all the costs of determining the construction of a will.

Mr. Francis Brady, for the rector of the parish of St. Peter's.

Mr. Cassidy, for the Attorney-General, submitted that there was such an indication of a general charitable intention, that the Court would carry it out *cy pres*.

The LORD CHANCELLOR.

I am not satisfied in this case that, on the materials before me, I could say that this institution comes within the description of a school annexed to the Episcopal chapel in Upper Baggot-street, according to the provisions of the trust deed. The chapel seems rather to be annexed to the school, or the establishment contended to be a school. I think it is better that some points of evidence

Judgment.

(a) 2 Cox, 365.

(b) 2 Bro. 428.

(c) 3 Ir. Chan. Rep. 213.

(d) 2 M. & K. 576.

(e) 13 Beav. 87.

(f) 2 Kay & J. 615.

(g) 5 Russ. 113.

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*Judgment.*

should be supplied, which might aid in arriving at a right conclusion; and I do not think it necessary just now to discuss the questions raised, respecting the construction of the bequest, as I think that at present I cannot do anything more than refer it to the Master to inquire whether there is a Protestant school attached to this chapel, within the meaning of the will. Then there arises the question as to what direction is to be given, in case the Master shall find that there is not such a school? It has been contended, on the part of the petitioner, that this sum of £1000 is so appropriated to this particular purpose, that, if it appear that there is no such school, it cannot be applied for any other charity, and must fall into the residue for the benefit of the petitioner, who is residuary legatee. On the other side it was alleged that, even if this institution were not within the precise language of the will, yet, on the whole language of the testator, a general charitable intention appears to have been shown; so that I can apply the doctrine of *cy pres*, and appropriate the fund to some other charitable purpose.

In this case there are some peculiarities. The petitioner here fills several distinct characters. He is petitioner; he is executor of this charitable fund, and he is residuary legatee; and he has, therefore, a personal interest in the decision; he has an interest apart from that which, as executor, he would have, to come here to be absolved from all liability in respect of the future application of the fund; and, therefore, this cause petition was rightly instituted, as the will does raise a question of some difficulty.

I am, however, quite satisfied that there is a general purpose in favour of charity indicated in this will. If I am to act on the authority of *The Attorney-General v. The Ironmongers Company* (a), I must certainly hold the general charitable intention to have been manifested. The principle is there laid down very clearly, in such language that it is difficult to conceive a case coming more completely within it than the present; Lord Brougham saying:—"So, in the case of a charity, when I bequeath £100 to one object, and £50 each to two other objects of bounty, my trustees

(a) 2 M. & K. 576.

violate their duty if they give less than £100 to the one, and more than £50 to each of the other two; and that, whether I use words of exclusion, such as "no otherwise," "no other charities," &c., or omit to use them. But, when the one object fails, the doctrine of *cy pres* becomes applicable, although it has no place in legacies to individuals; and the intention to which the Court is to approximate will be gathered from the other gifts, and from the gift itself." The words here are very general. I find a legacy of £2000 given, as to £1000 in trust for one charity, as to the other £1000 for the other; and, taking the intention from the whole instrument, I cannot but feel convinced that that whole £2000 was intended to be applied for a charitable purpose of this kind.

Then it is said, on behalf of the petitioner, that the doctrine of that case is controlled by another principle, viz., that if there be but a single object of charity named, and that confined to a single locality, definitely specified and pointed out, then there is no room for the application of the doctrine of *cy pres*; but, if the prescribed object be wanting, the legacy fails, as in the case of a legacy to an individual. A *dictum* of the Master of the Rolls, in the case of *The Attorney-General v. Hurst (a)*, was referred to. In that case, the testator had bequeathed the residue of his personal estate, upon trust to pay £12 per annum to the schoolmaster at Ravenstone, and to apply the surplus, if any, in clothing and apprenticing two children of the parish of Ravenstone, and one of the parish of Little Woolstan. The fund was too large for these objects, and the surplus was held applicable to general charitable purposes; Sir Lloyd Kenyon saying:—"If there is one particular object to which a testator's mind applies, as the building of a church at Wheatley, and that purpose cannot be answered, the next-of-kin must take, there being in that case no general charitable intention; but when, as in the *Case of Thetford School*, and other cases, the testator intends to give all generally to charitable purposes, the increase will go *cy pres*." Now that case of a church at Wheatley, which was relied on, is a very particular case, suggested by the Master of the Rolls—that of building a church in a certain specified place; the intention there does not

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(a) 2 Cox, 364.



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go beyond the benefit of this precise locality, and there is nothing to show that building a church in another place could at all have come within the wishes of the testator. Then it is said that, in *Carrberry v. Cox* (a), there was a decision which went upon the principle of that *dictum*; but, in truth, it was a very different case from the present, so far as regards the particular bequest which was then in question. It was the gift of a perpetual annuity to the monks of Mount Melleray, near Cappoquin, to be appropriated for the improvement of the chapel of Melleray. That was as like the case of a bequest for building a church as could well be imagined; and, accordingly, Lord Chancellor Blackburne says there:—“The finding as to this is, that the defendant, the Rev. Matthew Joseph Ryan, who is the successor of the Very Rev. Michael Vincent Ryan, deceased, is the abbot and principal of the monks of Mount Melleray. From this I infer that, since the death of the testator, Michael Vincent, who was then the abbot or principal, has died; so that I cannot recognise any right in his successor; neither can I discover any general charitable purpose that can authorise the Court in devising a scheme.” That bequest, however, was of an annuity—a specific bequest, standing by itself, and totally without anything to indicate a general purpose of charity; and, therefore, it was decided to belong to the residuary legatees. In the very same case, however, the *cy pres* doctrine was applied to another bequest more like this, by which the sum of £20 yearly was bequeathed “to the monks of Shandon, near Dungannon, to provide clothing for the poor children attending their school.” The school was accidentally discontinued; but the Lord Chancellor held that, even if the school was altogether to cease, there was such a general charitable intention indicated as to be capable of being carried out by a scheme before the Master. Some other decisions may be mentioned, showing that the doctrine may be applicable even in the much weaker case of an isolated bequest, if the bequest can be seen to imply a general charitable intention. *Hayter v. Tighe* was a case where the testator gave £500 to a voluntary society called the “Plymouth

(a) 3 Ir. Chan. Rep. 231.

and Devonshire Asylum for for the reception of female penitents." This society was in existence at the time when the will was made, and at the death of the testator, but was soon afterwards dissolved; and the Master of the Rolls held that there was a sufficient indication of a general charitable purpose, and directed a scheme to be prepared by the Master, in order to the execution of it *cy pres*.

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One case was mentioned, in which a question not unlike this occurred; I mean *In the matter of the Clergy Society* (a); and it is more analogous perhaps than any other to the present, in this respect, that the will bequeathed several sums to different institutions of a similar character; and then, though one could not be found, it was held that the bequest to it could be applied to charity *cy pres*. The will was:—"I bequeath to the following societies or institutions established or carried on in London the several legacies or sums next hereinafter mentioned; that is to say, to the Church-building Society the sum of £2000 £3 per cent. consols; to the Clergy Society the like sum of £2000, like annuities;" and so on, giving similar legacies to other societies. The executrix could not discover what society was meant by "the Clergy Society." Several institutions claimed this legacy, and the executrix paid it into Court under the Trustee Relief Act. It was strongly argued that the gift must be held void for uncertainty, because no object could be found to answer the description; but a scheme was directed, the Vice-Chancellor saying:—"The right course seems to me to be to direct a scheme for the application of this fund in London; the testatrix has specified that locality, though she has not sufficiently defined the object of the gift." That decision is a very useful guide in this case; for we have the separation of these two sums from the rest of the property, which are stated to be for the benefit of schools in St. Peter's parish. One of them is mentioned, in a general way, as the school of the parish; the other, which he shows a wish to benefit, is also situate in the parish of St. Peter; and therefore there is, so far, an indication of intention to benefit the Protestant schools in the parish of St. Peter.

In *Barrett v. Hayter* (b), the testator bequeathed as follows:—

(a) 1 K. & J. 615.

(b) 2 Beav. 81.

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"I leave, after the death of Lucy Hawes, as many thousand £3½ per cent. to the following charities; viz., £1000 £3½ per cent. to the Jews' poor, Mile-end," and so on to a number of other charities.

There was a reference to inquire what charity was meant by the "Jews' poor, Mile-end," and a controversy arose as to which of two institutions was entitled to this; and the Master found that there was no sufficient evidence as to what charity was meant by the testator by the description of the "Jews' poor, Mile-end." Both charities filed exceptions to the report. The Master of the Rolls overruled both sets of exceptions, but applied the fund, by the doctrine of *cy pres*, to the two charities equally. Thus, in fact, the gift there was to a particular institution, of a portion of a larger sum, the whole of which seemed to be dedicated to charitable purposes—a case precisely analogous in that respect to the present; and the Master of the Rolls, not being able to find the particular institution intended by the testator, proceeded to have a scheme settled, by which his wishes might be carried out *cy pres*.

I need not, however, go more at length into the cases, the whole of which are collected in a note to the case of *Loscombe v. Winteringham* (a); but on the grounds which I have mentioned, looking to all the cases and to the language of Lord Brougham, I do not think that I can hold that there is any expression in the will to indicate an intention that the fund shou'd not be applied for the benefit of anything save schools attached to this Episcopal chapel, or to show an appropriation of this sum to one purpose only. The intention expressed is in favour of schools in St. Peter's parish, one in one place and another in another. There appears a general intention to support such schools, and I think it a fit case to make a reference as to the proper application of the fund.

Then the question arises, who is to pay the costs of this suit? Now, it is plain that if this had been a cause petition to have a general administration, and this question had arisen in it, all the costs must have come out of this general personal estate. The legatee is entitled to be paid his legacy, discharged of all such deductions; he is to have it clear; and whether the administration takes place with

(a) 13 Beav. 84.

or without the aid of a Court of Equity, he is entitled to have the legacy exonerated. If, in order to have the rights clearly ascertained, any expenditure is necessary, whatever costs may be so incurred must fall on the personal estate. The cases are very full upon the point. I had them before me in the case of *Williams v. Armstrong* (a), in which a question of construction was raised as to a particular fund; and I then held that "the costs of all necessary parties to an administration suit, occasioned by a question on a will, come out of the general assets, and cannot be thrown on a particular fund, though the only difficulty arises between the parties interested in that fund, and there is no question as to the rest of the assets." In that case the question was as to the construction of the word "balance." The testatrix had bequeathed certain amounts out of a sum of stock, which was really only £1750, but which she stated in the will to be £2255, to certain parties respectively, and gave the balance to a particular individual; and the question was whether, according to *Page v. Leapingwell* (b), the balance was to be taken as an ascertained aliquot share of the actual fund, or whether the legatee of the balance was not to get anything until the others were fully paid. I held that the legatee of the balance could get nothing, the fund being deficient; but that although the question only concerned that particular fund, still, on the result of all the authorities up to that time, the costs of all parties were held to come out of the general residuary estate. There is another case much to the same effect, *Wilson v. Squire* (c), which was a suit for administering a testator's assets, and in which a legacy was claimed by two legatees adversely to each other; and it was held that, as the question arose on the testator's will, the costs must be borne by his estate, and not by the legacy; the Vice-Chancellor saying:—"If a fund be separated from a bulk of the testator's estate, and then a question arises about it, the fund pays the costs. But if the question is, who is entitled to the fund in the first instance, that question is raised by the testator himself, and his estate must bear the costs; for a testator's estate bears the costs of all the questions

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(a) 12 Ir. Eq. Rep. 356.

(b) 18 Ves. 463.

(c) 13 Sim. 212.

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that arise on his will respecting it. In this case, therefore, the costs of all parties must be paid out of the estate."

Now here we have a fund which has never been separated from the estate of the testator. The petitioner, who comes to seek the directions of the Court, is the executor and residuary legatee under the will, and is the trustee of this particular fund. There is no other trustee of it; it has never been appropriated to a separate trust. There has been no administration of the estate; the consequence is, that if there were a suit by the Attorney-General, or by the charity, to have an administration, or by the executor, to have his rights ascertained, the costs must come out of the fund. In this case the distinction is taken that it is not for general administration, but to have the rights in this fund ascertained; in other words, it is filed partly for the protection of the executor, partly for the purposes of the owner of the fund, whoever he may be. Under these circumstances, I think that up to this point the costs should be paid out of the residuary estate, and that the remaining costs should be borne by the fund itself, as if brought in under the Trustee Relief Act.

Mr. *Brewster* and Mr. *May*, for the petitioner.

*Argument.*

If this fund had been brought in under the Trustee Act, that expense would have been imposed on the fund, in addition to the expense of a petition against the Attorney-General, which would, no doubt, have been directed by the Court. It was for the benefit of the fund to take the course here adopted; and the petitioner, who is himself the residuary legatee, ought not to be burdened with this expense. The fund is perfectly appropriated on special trusts, and separated from the rest of the property. It is not an administration suit, it is merely in the nature of, and analogous to, proceedings under the Trustee Relief Act.

The LORD CHANCELLOR.

*Judgment.*

I do not think that there is anything here to take this case out of the general rule; nor ought the executor to be allowed to evade the settled rule on the subject, merely by an alteration in the form of proceeding. The executor comes for the advice of the Court,

and the general personal estate must pay for that. It is settled by the cases to which I have referred, that whenever a suit is instituted for the administration of personal estate, though there be only a question as to the bequest of a particular fund, it is a matter of strict right that the meaning of the will is to be declared at the expense of the general estate. It is now, however, contended that an executor, keeping portions of the assets in his hands, and after the general estate is wound up, may say, "Here is a particular sum, respecting which I will ask the opinion of the Court," and may throw on that fund all the costs of that inquiry. I allow that, if it can be once properly vested in separate trustees, and thus completely severed from the residue, it may, if a question arises, under some circumstances, be made to bear the costs; but I do not think that it can in this way, which would be just as applicable if there were twenty different funds to be disposed of, as in the present case. I cannot allow the residuary estate to be withdrawn from its proper liability by this method of proceeding. If the executor has any assets, he must pay these costs out of them. All that I can do is to have the money, if now brought into Court, made to bear the costs of any further litigation respecting it.

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*Judgment.*

*Reg. Lib. 26, f. 185.*

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**Court of Appeal in Chancery.**

**KERNAGHAN v. M'NALLY.**

*Dec. 9.*

A widow filed a bill for dower against alienees of her husband. In order to make out her title to dower, the petitioner was obliged to give in evidence a deed, by which the estate had been conveyed to the person from whom her husband claimed. This deed contained a recital that the legal estate was outstanding in certain trustees. The petitioner also gave in evidence certain orders of the Court of Chancery, to show that such recital was mistaken.—*Held*, that she was entitled to a reference to ascertain the lands of which she was dowerable.

*Statement.*

THIS case came before the Court on an appeal from an order of the LORD CHANCELLOR, dated the 11th day of July 1859, by which he had dismissed the petition. The following were the material facts of the case :—Alexander Nixon made his will, dated the 5th day of March 1776, and thereby devised certain lands therein mentioned, to his executors, therein named, in trust for his eldest son, George Nixon, and bequeathed all the residue of his real estate to his executors, in trust for his younger children, as tenants in common, subject to the charges in the said will mentioned. In the month of November 1776, after the execution of said will, the said Alexander Nixon purchased the lands of Rea's-tenement or Rea's-park, which were conveyed to him by deed of the 16th of November 1776.

Mr. Alexander Nixon died in 1791, leaving his said eldest son and six younger sons surviving him; and these younger sons immediately went into possession of Rea's-park, and so continued in possession until the subsequent sale thereof, and dealt with it as their own property. An administration suit (known as *Scott v. Nixon*) having been instituted by a judgment creditor of Alexander Nixon, a decree was made in it for a sale; and Rea's-park was, on the 24th of April 1839, sold to George Rankin. A reference respecting the title of Rea's-park having been then made, and the Master having reported good title, the purchaser took exceptions to this report, which were allowed by the Master of the Rolls, by an order dated the 14th of January 1843. From this order the plaintiffs appealed; and, on the 8th of February 1843, Lord St. Leonards (the then Lord Chancellor of Ireland) reversed the order of the Master of the Rolls, on the ground that the younger children

of the said Alexander Nixon had acquired an indefeasible title, by an adverse possession of more than twenty years: *vide* this case, reported as *Scott v. Nixon* (a). Accordingly, by an indenture, bearing date the 3rd day of April 1844, and professing to be made by Master Litton, of the first part, James Scott, Esq., of the second part, Adam Nixon and Alexander Nixon, of the third part, the said Alexander Nixon and Maryanne his wife, of the fourth part, Hannah Scott, Elizabeth Scott and Mary Scott, of the fifth part, Ralph Scott, of the sixth part, Adam Nixon, of the seventh part, Montgomery Downes Nixon, Frederick Nixon, Mary Nixon, Henry Carey Field, Jemima Field and Espine Ward and Sophia his wife, of the eighth part, William Ribton Ward and Montgomery Downes Nixon, of the ninth part, Jemima Nixon, of the tenth part, the Rev. Alexander Nixon, of the eleventh part, the Rev. Thomas James Oven-den, of the twelfth part, Alexander Power, of the thirteenth part, the said Adam Nixon, of the fourteenth part, and the said George Rankin, of the fifteenth part, the parties thereto of the first fourteen parts conveyed to the said George Rankin Rea's-park or Rea's-tenement in fee. This deed contained a recital that the legal estate in those lands was in the representative of the trustee of Alexander Nixon's will; and the conveyance was not executed by such representative.

On the 26th of June 1844, the said Joseph Rankin conveyed the lands of Rea's-park to Thomas Kernaghan, the appellant's husband, in fee. In 1848, Thomas Kernaghan made a conveyance of all his property to trustees, for the benefit of his creditors. In 1849, the trustees, having set up Mr. Kernaghan's property for sale by auction, Rea's-tenement was purchased by Edward Duffy. On the investigation of the title on behalf of the purchaser, it was objected that the property was subject to the petitioner's title to dower. This objection was afterwards compromised, by the parties permitting the purchaser to retain £200 out of the purchase-money, the petitioner refusing to release her dower. On the 8th of August 1850, the lands of Rea's-park were conveyed to Edward Duffy in fee, by a deed in which the petitioner was named as a party, but not executed

1859.  
*Ch. Appeal.*  
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(a) 6 Ir. Eq. Rep. 8; S. C., 3 Dr. & W. 388.



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**KERNAGHAN**  
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**M'NALLY.**  
*Statement.*

by him, and containing a recital that the petitioner was entitled to dower out of the said lands, contingent on her surviving Thomas Kernaghan. On the 21st of January 1851, said Edward Duffy conveyed Rea's-park to the respondents Charles M'Nally, Daniel Boylan and Thomas Gartland, in fee.

Thomas Kernaghan having died, the petitioner instituted this suit, for the purpose of recovering her dower out of Rea's-tenement. At the hearing in the Court below, the deed of the 8th of April 1844 was given in evidence on the part of the petitioner, who had had no opportunity of seeing it before that hearing; and, it appearing, by the recitals in that deed, that the legal estate was outstanding in trustees, the LORD CHANCELLOR made a decree dismissing the petition. From this order the present appeal was brought.

The *Solicitor-General* (Mr. R. Deasy) and Mr. F. W. Walshe (with them Mr. Richey), for the petitioner.

*Argument.*

The widow, in a suit for dower, has a clear right to have an opportunity of trying her title in the Master's office, or by an action at Law, if her title to dower be controverted: *Mundy v. Mundy* (a); *Curtis v. Curtis* (b); *Dormer v. Fortescue* (c); *Darcy v. Blake* (d). And she has also a right to the assistance of the Court, to enable her to have an opportunity of trying that title. That is all the relief we seek here, although we have made a case which really shows the petitioner to be entitled. The decision in *Scott v. Nixon* (e) shows that the legal estate was vested in the younger sons of Alexander Nixon, and that the trustees of his will were as much excluded from the property as the eldest son was. That decision shows that the deed was mistaken in reciting the legal estate to be in the trustees; and we only ask not to be concluded by this erroneous recital. If we be not, Sir Edward Sugden's decision in *Scott v. Nixon* determines the whole case in favour of the petitioner; and, even if there be anything like an estoppel in that

(a) 2 Ves. jun. 125.

(b) 2 B. C. C. 620, 632.

(c) 3 Atk. 130.

(d) 2 Sch. & Lef. 390.

(e) 6 Ir. Eq. Rep. 8; S. C., 3 Dr. & War. 388.

deed, the conveyance to the respondent operates as forcibly in the petitioner's favour.

Mr. *Brewster* and Mr. *Lawson*, contra.

The deed states the finding of the report, under which the property was sold; and as the petitioner can only make title through that deed, she is estopped from disputing the averments in it: *Bowman v. Taylor* (a). The deed clearly failed to pass a legal estate. The younger children had no colour of title, save under the will, and could not be heard to say that they did not derive their title under it: *Hawksbee v. Hawksbee* (b); *Anster v. Nelms* (c); *Garrard v. Tuck* (d); *Melling v. Leak* (e).

The LORD CHANCELLOR.

This is a very singular case. I think that there ought to be some further inquiry; and it would only put the parties to a needless expense to leave the petitioner to institute another suit; but the petition of appeal does not at all point to the case made here at the Bar, nor was it suggested at the hearing before me. Under these circumstances, I think that there ought to be a further inquiry, but that the appellant must pay the costs of the proceedings, which her own conduct has rendered necessary. I think that there must be a reference to one of the Masters, whether Mr. Kernaghan was seised of these lands.

The LORD JUSTICE OF APPEAL.

The petitioner, who claims dower out of the estate purchased by her deceased husband, naturally relied on the deeds which constituted his title. One of them, being the conveyance under the decree of this Court to a trustee for him, was produced by the respondent, and was read, and entered as the evidence of the petitioner. The effect of this deed, as conveying a legal title, was in fact the only matter discussed; and the LORD CHANCELLOR decided,

(a) 2 Ad. & El. 278.

(c) 1 H. & Nor. 223.

(b) 11 Hare, 230.

(d) 8 C. B. 231.

(e) 16 C. B. 652.

1859.  
*Ch. Appeal.*

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Argument.

Judgment.

1859.  
*Ch. Appeal.*

KERNAGHAN

v.

M'NALLY.

*Judgment.*

most properly, that it did not pass the legal estate, not having been executed by the heir of the surviving trustee in the will of Alexander Nixon, or by a trustee legally constituted in his place. This assumed (and there was no evidence to the contrary presented to the view of the Court) that the legal estate had passed to the trustees in the will of Alexander Nixon, of 1766, as the deed recited; and the objection to the petitioner's claim, so far, appeared to be conclusive. There were, however, several orders and proceedings in *Scott v. Nixon*, in which the lands had been sold to a trustee for the petitioner's husband, entered as proofs on the part of the petitioner; and now, for the first time, they are brought under our consideration. I do not believe that there is an allusion made in the case of either the appellant or respondent to them. The result is, that they disclose a state of the title quite at variance with the recital in the deed of sale, on which the petitioner had entirely rested, and on which alone the LORD CHANCELLOR had acted in dismissing the petition. From them the real state of the title appears to be, that the lands were purchased by the deviser after the execution of his will; that they did not pass to the trustees, but that the six sons claiming as devisees of the testator became seised and possessed of them, as if they had been well devised; and so had acquired such a title by adverse possession as the purchaser was bound to accept. This evidence satisfies the object which I had in view in asking whether, besides the deed of sale, there were any deeds or facts on which the dowress could rely, as putting her claim on grounds different from those founded on the truth of the recitals of the purchase deed under the Court.

The consequence of the evidence I have alluded to, as now disclosed, is, either that the petition should be dismissed without prejudice, or that we should reverse the decree, and direct an inquiry into the title. The latter is, for all purposes, the more convenient course; but it must be on the terms, as to costs, suggested by the LORD CHANCELLOR.

*Chancery Appeal Hearing Book, 1, f. 330.*

1860.  
Bankruptcy, &c.

**Court of Bankruptcy and Insolvency.**

In re JOHN QUIN a Bankrupt;  
Ex parte CHRISTOPHER MOORE.\*

June 6, 14.

In this case Christopher Moore sought to prove on the bankrupt's estate for £251. 7s. 11d. The facts, as appeared by the affidavit of Moore, sworn the 30th of May 1850, were as follows:—In 1859, the said Christopher Moore, being desirous of taking down and re-building the front wall of a house occupied by him, No. 144 Upper Dorset-street, and of making certain alterations in the next house, No. 145, entered into a contract with the bankrupt, who was a builder, for the above work, for the sum of £150. Some extra works, not in the estimate, were done, and the whole completed according to contract. On the 17th of September 1859, the bankrupt was paid for the entire works, original and extra, the sum of £177. 12s. 8d. On the 13th of July 1859, the works being then in progress, a notice was served upon Moore, by Edward Doran, who resided next door, at No. 146, that said alterations were likely to be injurious to his house, and that Moore would be held liable for any damage caused by said alterations. Moore showed said notice to the bankrupt, who assured him that the works in progress could not in any way injure Doran's house, and, as a guarantee, indorsed on the estimate of the works a memorandum, dated the 23rd of July 1859,

A employed B, a builder, to take down the front wall of his house, and execute some other repairs. While the works were in progress, C, the occupier of the adjoining house, served a notice upon A, that injury was likely to result to his house from the repairs, and that he would hold A responsible. B, upon this being mentioned to him, wrote on the estimate of the works the following memorandum:—  
“In carrying out the foregoing work, I hereby undertake to hold myself responsible for any injury done to

the adjoining houses.” Some works in addition to these in the estimate were done, the contract was completed, and B paid in full for all. C brought an action against A, averring negligence, and alleging various injuries to his house from the works. B, upon being called upon to settle or defend the action, made no reply, and soon after became bankrupt and absconded. A, having had to pay £191. 7s. 11d. damages and costs, and £60, his own expenses in the action, sought to prove for £251. 7s. 11d.—*Held*, that (supposing the memorandum to constitute a contract upon a valuable consideration) the damages which C might recover against A were not necessarily identical with those contemplated by the guarantee, and that A could not prove for the above sum, either as for a debt payable upon a contingency, within s. 257, or as for a liability to pay money upon a contingency, within s. 258.

\* *Coram* LYNCH, J.

1860.  
*Bankcy., &c.*

*In re*  
*QUIN.*

*Statement.*

in the following words:—"In carrying out the foregoing work, I undertake to hold myself responsible for any injury done to the adjoining houses, Nos. 143 and 146." The works were accordingly completed and paid for. On the 31st of October 1859, Moore was served with a writ of summons and plaint, at the suit of the said Edward Doran, who claimed £1100 damages for the injuries alleged to have been done to his house. Moore called upon the bankrupt to settle or defend the action, but got no reply, and shortly after the bankrupt absconded from this country. Doran recovered in said action £75 damages against Moore, together with £116. 7s. 11d. costs, which sums, amounting in all to £191. 7s. 11d., Moore was obliged to pay. In addition to the above sums, Moore had incurred other costs and expenses in defending the action, amounting to £60. Moore claimed to prove for the above sums, making, in the whole, £251. 7s. 11d.

*Argument.*

Mr. *Sidney*, for the assignees, cited *Maples v. Pepper* (a); *Warburg v. Tucker* (b); *Young v. Winter* (c); and contended that *Lewis v. Peake* (d) did not apply. On the point whether Moore was entitled to recover the costs which he had to pay in the action, he cited *Mayne on Damages*, pp. 28, 29; *Tindall v. Bell* (e); *Short v. Kalloway* (f); *Beech v. Jones* (g); *Pierce v. Williams* (h).

Mr. *James Kernan*, for Moore, referred to the Bankrupt Act, sections 253 to 258, especially ss. 257, 258, and commented on *Tindall v. Bell*, and cited *Lampleigh v. Brathwait* (i); *Lewis v. Peake* (k); *Smith v. Compton* (l). The form of the guarantee

(a) 18 C. B. 177.

(b) 4 Jur., N. S., 1142; S. C., 9 E. & B. 914.

(c) 16 C. B. 401.

(d) 7 Taunt. 153.

(e) 11 M. & W. 228.

(f) 11 A. & E. 28.

(g) 5 C. B. 696.

(h) 23 L. J., Ex., 322.

(i) Hob. 105; S. C., 1 Sm. L. C. 126, 127.

(k) *Ubi sup.*

(l) 3 B. & Ad. 407.

may be said to be one that sounds in damages. The contingency was the ascertainment after the bankruptcy of an injury done before the bankruptcy. It is a hardship, and is contrary to the principle of the Bankrupt Law, that he who has given up his estate should be left liable to a demand ascertained before bankruptcy. If the amount of damages be ascertained before bankruptcy, why can we not prove? —[LYNCH, J. Is it necessary to have recourse to that section? Is this not an existing debt?—He cited *Boyd v. Robinson* (a). In this case the liability was incurred before bankruptcy, therefore we are entitled to prove. As to costs, he cited *Lewis v. Peake* (b).

1860.  
*Banktcy., &c.*  
*In re*  
*QUIN.*  
*Argument.*

LYNCH, J.

This was a claim made by Christopher Moore, for £251. 7s. 11d., on foot of an alleged indemnity, indorsed on the contract, and dated 23rd of July 1859. Moore was the owner of a house in Dorset-street, and had entered into a contract with the bankrupt, whereby the bankrupt was to make certain alterations in Moore's house. After the contract was made, and while the work was in progress, Edward Doran, the owner of the adjoining house, apprehending damage to his concerns, from the works, served a notice on Moore, cautioning him respecting the apprehended mischief, and threatening to hold him responsible therefor; upon this the bankrupt indorsed on his contract the alleged indemnity, in these words:—"In carrying out the foregoing work, I hereby undertake to hold myself responsible for any injury done to the adjoining houses 143 and 146." After this the works proceeded. The bankrupt completed his contract with Moore, and was paid in full. A short time after, Quin became bankrupt and, absconded. The petition was filed on the 9th of November 1859. On the 31st of October 1859, an action was brought against Moore by Doran, for the injuries done to his house during the alterations made, for changes injuriously affecting him in the new works, and for resulting injuries in stopping his trade, &c. Negligence is alleged in the summons and plaint; but, on examining the pleadings in that case, and the issues raised, in my opinion the damages that Doran might recover against Moore

June 14.  
*Judgment.*

(a) 5 C. B., N. S., 597.

(b) 7 Taunt. 153.

1860.  
*Banktcy., &c.*

*In re*  
QUIN.

*Judgment.*

are not identical with those contemplated by the memorandum on the contract; the memorandum contemplates merely injuries done to the house by the works in execution, and would not, I think, cover the case of the change of the building, no matter how well executed, which might have rendered Moore liable to an action, as for instance stopping ancient lights, or interfering with other easements belonging to the adjoining house. I, therefore, do not think that the amount of damages and costs recovered in the action against Moore is the necessary amount of damages to be recovered in an action by Moore against the bankrupt, if such action lay on this memorandum. In my opinion, any claim on foot of that memorandum, which now exists, is plainly a claim for unliquidated damages, for not repairing or making good any injury done by him to the adjoining house, in the works executed by him. The language of the memorandum is not indemnity from any claim by the owners of the houses against Moore, it is only for responsibility for injury done; and I cannot see that these are identical. It is unnecessary for me here to decide whether the contract disclosed by the memorandum has really any valuable consideration to support it. The contract was then complete, and in course of execution, and bound Moore as well as the bankrupt; and it is not easy to see the consideration for it, as it is now sought to interpret it; but I do not think it necessary to decide this point, as my opinion is, that this claim, even admitting it to be a liability of the bankrupt, is not proveable in the bankruptcy.

It is now sought to prove against the estate of the bankrupt the claim which exists on foot of the memorandum, against the bankrupt; and several cases have been cited to me, showing the construction put on the provisions of the statute respecting proofs for debts payable on a contingency, and for liabilities to pay money upon a contingency. In addition to the cases cited to me, I have two very material cases on this point: *Boyd v. Robins* (a), on a guarantee (continuing) for goods supplied, in which case the Exchequer Chamber reversed the decision of the Common Pleas, as to the goods supplied after the bankruptcy of the guarantor, and

(a) 4 C. B., N. S., 749; in Error, 5 C. B., N. S., 597.

*Parker v. Ince* (a). These cases bring down the decisions of the Courts to the latest period reported, and are in accordance with the cases cited already. I am not going into any minute consideration of the cases, or the points of difference in them, as, in my opinion, this case does not require for its decision any such nice considerations. Take the words of the statute themselves, and see if, by any possibility, this claim can be embraced. Moore, certainly, at the time of the bankruptcy, had no debt due to him, or no claim of any sort against the bankrupt. The bankrupt had undertaken to be responsible for injury to the adjoining houses, and was responsible for it, if injury happened, but between him and Moore there was no debt and no liability then; but if Moore is called upon to do what the bankrupt contracted to do, namely, to discharge the damages for injury done to an adjoining house, then he will have an action over against him on his contract: and this contingent circumstance of liability is said to be within the statute, either as a debt payable upon a contingency, or a liability to pay money upon a contingency. Now it seems to me clear it is not a debt payable on a contingency, for it is in no sense a debt at all, and it is not a liability to pay money on a contingency, for there is no liability to pay money at all, unless I were to hold that every sort of liability in *torit*, which, in the end, may result in damages, is properly expressed by the phrase liability to pay money. Therefore, in my opinion, it is impossible for me, upon the language of the statute, and having regard to the decisions of all the Courts in England on it, to say that this claim comes within its provisions, and I consequently feel bound to rule that this claim cannot be admitted as a proof. I confess that, in coming to this decision, on the ground of the nature of the claim, supposing it to be otherwise a well-founded one, I regret the necessity which the language of the statute and the cases already decided impose on me, and I do not see the policy of excluding from proof any well-founded demand, because of any difficulty that may exist as to its ascertainment. Serious injustice may be done parties with perfectly clear rights, by this Court rejecting claims on the grounds put in many of the cases; and a man may, through this Court, be

1860.  
*Bankcy., &c.*  
In re  
 QUIN.  
 Judgment.

(a) 4 H. & N. 53.



1860.  
*Bankcy., &c.*

*In re*  
*QUIN.*

*Judgment.*

rendered insolvent to discharge liabilities quite as proper to be discharged as any ascertained debt due at the time of his bankruptcy. However, I have but to administer the law as established; and I shall be glad if I am shown to be wrong in the decision I have come to.

Let the claim be rejected, with costs.

*April 22,*  
*May 2.*

In re EDWARD RUBY JOHNSTON an Insolvent.\*

The decision in this case, *ante*, vol. 9, p. 559, confirmed.

Property acquired by an insolvent, subsequently to his insolvency, is charged with a first trust for his subsequent creditors; and, before the Court will attach such subsequently acquired property, it must be satisfied that the insolvent is of ability to pay his scheduled debts; and this ability to pay is not to be determined by the casual possession of a fund, but by the possession of assets *ultra* the liabilities subsequently incurred.

*Judgment.*

THIS case is reported, on the point upon which it formerly came before the Court, *ante*, vol. 9, p. 559, where will be found the material facts.—Judge LYNCH having directed a reference to the Chief Clerk to inquire and report as to the debts of the insolvent, alleged to have been incurred subsequently to his insolvency, the case now came before the Court upon the report of Mr. Kelly, acting for the Chief Clerk. The debts in the first schedule to the report amounted to £48. 3s. 11d., those in the second schedule (including £250 due to Mrs. Ackleston, the sister of the insolvent) to £1337. 8s. 3d., making in all £1385. 12s. 2d. The funds to meet the above liabilities consisted of £1150 realised, including the sum of £273. 1s. 11d. lodged in Court; a sum of £500, to which the insolvent was entitled in expectancy, and a debt of £40, which was pronounced very doubtful, if not bad.

Mr. D. C. Heron, for the assignee.

Mr. C. R. Barry, for the insolvent.

LYNCH, J.

This case comes again before me upon the report of Mr. Kelly, acting for the Chief Clerk, upon the reference which I offered to the

\* *Coram* LYNCH, J.

assignee, respecting the debts alleged by the insolvent to have been incurred since his insolvency. Already in this case I have remarked that the order made, attaching the subsequently acquired funds of the insolvent, seemed to me to have been made before the facts were ascertained which could warrant any order being made attaching them as funds in the insolvency; but I have decided, and I abide by that decision, that the saving in the order of the 20th of October leaves the case now to be dealt with by me as if the money were not already paid into Court to the credit of this matter, and that I am free to consider whether it is at all a fund proper to be dealt with in the insolvency. In looking into the provisions of the statute, I think subsequently acquired property of the insolvent is certainly charged with a first trust for his subsequent creditors, and that it never was meant, or could be meant, that any funds in his possession subsequently were actually bound with an existing liability to be brought in as funds in the insolvency. To hold that would leave the insolvent incapable of conducting any business until he had discharged all his schedule debts. However, I cannot yield in any way to Mr. *Barry's* argument as to the anticipated legislation in England on this subject; it is not as yet even the law there: and were it law, I could not regard it here, although I do hope and trust that the law will always stand on the same foundation in both countries, and that we may have the same principles and the same procedure in each. We have the same Court of Appeal, and our precedents and authorities ought to be of the like operation in each; and, I think, everything making our practice different, or our laws not the same, is a great mischief to this country. But I have nothing to do with any principle but that to be deduced from the Acts before me; and I hold the principle is, that before I attach subsequently acquired property, I must be satisfied that the insolvent is of ability to pay his scheduled debts; and this ability to pay is not, I think, to be determined by the casual possession of a fund in his name, but by the possession of assets *ultra* the liabilities subsequently incurred. This principle, being established, leads me then to consider the report before me. First, I am asked to declare that the alleged debt of £250 was never a debt, or that it was not to be

1860.  
*Banktcy., &c.*  
*In re*  
JOHNSTON.  
*Judgment.*

1860.  
*Bankcy., &c.*  
*In re*  
 JOHNSTON.  
 ———  
*Judgment.*

paid until after the debts under the insolvency. The report is inaccurate, in not finding whether it is a debt or not: however, I have now on this motion to determine that question on the evidence before me; and, in my opinion, finding the evidence all one way, and no suggestion made to lead me to doubt its truth, I feel bound to declare that it is a debt. A sister can lend to her brother as well as to a stranger, and the expected kindness and forbearance of a near relation is no foundation for declaring the loan not to be a debt; and merely regarding now the question of ability to pay by means of subsequently acquired property, it would be a strong measure for me to confiscate this money of his sister, in order to raise up an ability to pay by-gone debts, and this in direct opposition to the only evidence in the case. Taking, then, Mrs. Acklestone's debt as still due, the report shows me, in first schedule £48. 3s. 11d., in second schedule £1337. 8s. 3d., making a total of £1385. 12s. 2d.; and against this the assets are £1150 realised, an expectancy on a sum of £500, and a bad debt of £40. I do not think this shows a present ability to pay the schedule debts, for I do not think it shows a present ability to discharge his subsequent debts.

I, therefore, in this state of facts, must declare that the insolvent is not shown to me to have such ability, and hence, that this fund is not a fund properly applicable to the matter of the insolvency; and consequently I will order this fund to be restored to the insolvent.

The only matter I have then to consider is the costs. The motions, when made, were *prima facie* well-founded; and the realisation of the claim then existing would have discharged all the debts. By subsequent compromise, now unquestioned, the assets are diminished below sufficiency; but I think it proper to give the costs of the proceedings to the assignee, up to the hearing of the motion before me; but the reference was taken at the assignee's own risk, and I must hold that he substantially failed in every branch of it, and that I should give the insolvent the costs of these proceedings. However, on the whole, setting one off against the other, I will make the order without costs to either party, and give the insolvent back the £50 lodged in Court.

1860.  
*Bankcy., &c.*

In re JOHN M'KENNA a Bankrupt.\*

June 26.

IN this case, by an order of this Court, made on the 27th of March 1860, it was (amongst other things) ordered "that the carriage of all proceedings in the matter of this bankruptcy, after the creditors shall have been paid 20s. in the £1, and that this order has been complied with, shall be re-conveyed by the assignees in this matter to the bankrupt." The order also made payment of the assignees' costs a condition precedent to the transfer of the carriage of proceedings and re-assignment of the estate. On the said 27th of March, the bankrupt lodged to the credit of the bankruptcy matter a sufficient sum to pay the creditors 20s. in the £1, and they were afterwards paid in full, and the said order complied with, save as to the payment of the assignees' costs. Owing to a delay in the taxation of these costs, the bankrupt was unable to have the matter entered for a final audit, or to procure a re-assignment of his estate and effects. The bankrupt having applied to Henry Thomas Walsh, the trade assignee, for certain bills of exchange, drawn by the bankrupt on one John Nugent, and indorsed to the said Walsh, Walsh lodged the said bills with Mr. M. Murphy, the official assignee, who handed them to the bankrupt. The official assignee, upon being applied to, gave Mr. Gerrard, the bankrupt's solicitor, on the 19th of May 1860, the following authority:—

"DEAR SIR—If you lodge with me a written guarantee, relieving

trade assignees, A got an authority from B to take proceedings in the names of B and C for the recovery of debts due to the estate. A, having brought an action in the names of B and C, was served by C with notice to discontinue, on the ground that he had no authority to use C's name. The defendant in the action took defence, and gave notice of motion to set aside the summons and plaint, on the same ground. This Court, having been applied to while the motion in the Law Court (C. P.) was pending, ordered that said motion be not moved, that the action be proceeded with, and that C should pay the costs of this motion and of the motion in the C. P.

\* *Coram* LYNCH, J.

NOTE.—In this case application was made to the Court on a former day to grant an allowance to the bankrupt. The Court, having ascertained upon inquiry that the bankrupt had property over and above what went to pay 20s. in the £1, refused, on that ground, to grant the allowance.

1860.  
*Bankcy., &c.*  
*In re*  
 M'KENNA.  
 —  
*Statement.*

the assignees from any demand for costs, I will allow you to use my name, and that of Mr. Walsh, in suing for any debts due to the estate of Mr. M'Kenna.—Yours,

"MICHAEL MURPHY."

Thereupon Mr. Gerrard sent Mr. Murphy the following indemnity :—

"Re JOHN M'KENNA.

"To MICHAEL MURPHY and HENRY THOMAS WALSH, Esqrs.

"SIRS—I hereby personally undertake to indemnify you, as assignees of John M'Kenna, against any costs or expenses incurred or to be incurred in suing for the outstanding debts due to the bankrupt's estate, or otherwise in relation thereto.

"SAMUEL GERRARD."

On the 13th of June the bankrupt commenced an action in the Court of Common Pleas, in the names of the official and trade assignees, against Nugent, on foot of said bills. On the same day notice was served by Walsh upon the bankrupt to discontinue, on the ground that he had no authority to use Walsh's name, and Nugent lodged £15 with the official assignee on account of the bankrupt's demand. Nugent filed his defence, and on the 19th of June the bankrupt received notice of a motion in the Court of Common Pleas, to set aside the summons and plaint. That motion was still pending, and the bankrupt now applied to this Court, pursuant to notice, that he be at liberty to continue the proceedings taken by him, in the names of the assignees, against John Nugent, in the Court of Common Pleas, notwithstanding the notice of motion to the said Court, of the 19th of June, and for the costs of the motion to be paid by the said Henry T. Walsh or his solicitor personally.

Mr. *Gamble*, for M'Kenna.

Mr. *Dowse*, for Walsh.

*Argument.*

The bankrupt should in the first instance have got the order of the Court authorising him to use the assignees' names. Here Walsh is a trustee for the creditors. No man has power to use a trustee's name without his consent. If it be necessary to apply to the Court

now, it was necessary in the first instance. He cited *Bourke v. Murray (a)*.

1860.  
*Bankty., &c.*  
*In re*  
*M'KENNA.*

*Mr. Gamble.*

The assignee is not an ordinary trustee ; he is the officer of the Court.

*Argument.*

LYNCH, J.

It has been argued here that Mr. M'Kenna ought not to be permitted to proceed with this action against Mr. Nugent, on the grounds that there is not so much due as is sued for, and that the amount, being under £20, ought not to be sued for in the Superior Courts. I do not know enough of the merits of that case to go into any question of that kind. I have nothing to do with the merits of that case. Mr. M'Kenna paid all his creditors 20s. in the £1, and he was in a condition in April last to have got a re-assignment of his estate, and a legal title to institute proceedings in his own name for the recovery of this debt ; but he was stopped from doing so, by the agent of the commission not furnishing his costs, so to enable the bankrupt to pay them and get back his estate. If the bankrupt had been in that position, no one could have interfered with his proceedings to recover the amount of these securities. There was indeed no special order of this Court to bring the action, but there was a general order that the carriage of the proceedings should be given to the bankrupt, on his paying the 20s. in the £1, and the costs. It would have been more regular to have obtained the sanction of this Court before bringing the action, for the Court would not allow any action to proceed under its authority unless it saw that it was right ; and if any person has any just reason to show why the action should not be brought, it can be stated. But here the trade assignee is the person interfering to prevent the action from being brought in his name. Now, as long as he remains the officer of the Court, he is bound to submit to the directions of the Court ; and I cannot sanction that he, an officer of this Court, should, in defence of a debtor of the bankrupt, interfere to stop an action. Why should I interfere between Mr. M'Kenna and his debtor ? If the

*Judgment.*

(a) 10 Ir. Com. Law Rep., App., xi.

1860.  
*Bankcy., &c.*  
*In re*  
*M'KENNA.*  
*Judgment.*

trade assignee took exception to the proceeding with the action, and brought it before me in a formal manner, I would have considered it; but I cannot sanction that Mr. Walsh, the trade assignee, should of his own caprice interfere to stop the action. I will sanction the action already brought, and let Mr. M'Kenna proceed as he may be advised. The only question for consideration was, whether the assignees are sufficiently indemnified, and I think they are. I do not consider that Mr. Walsh has the slightest interest in the matter. If he have any interest, why is it that he has so? Because the agent had not his costs ready to be taxed, and delayed furnishing them from April to June. That was the only reason why Mr. M'Kenna had not got the assignment of his estate, to enable him to have his action tried in his own name. Mr. Walsh is the officer of the creditors up to this time. He has attempted to interfere with the action brought by the bankrupt. I direct that the motion in the Common Pleas be not moved, and that the action be proceeded with. I also direct that Mr. Walsh, the trade assignee, do pay the costs of this motion, together with the costs of the said motion in the Common Pleas, necessarily and properly incurred by the bankrupt, by reason of Mr. Walsh so proceeding, up to the 22nd of June inst.

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NOTE.—Vide *Laves v. Bott* (16 M. & W. 300, 362); *Spicer v. Todd* (1 Dowl. 306); *Whitehead v. Hughes* (2 Dowl. 258); *Emery v. Muchlow* (10 Bing. 23).

July 31.  
 August 1.

#### In re THOMAS LOCKHART a Bankrupt.\*

Where a bankrupt had traded recklessly, by means of accommodation bills, and had got extensive credit by representations that he was solvent, and that said bills were for value, the Court adjourned his final examination, *sine die*, upon the state of facts disclosed by his schedule.

THIS was a sitting for the final examination of the bankrupt. The passing of the final examination was opposed by the trade assignee, and by individual creditors, on the ground that the bankrupt had traded recklessly, by means of accommodation bills, and had re-

presentations that he was solvent, and that said bills were for value, the Court adjourned his final examination, *sine die*, upon the state of facts disclosed by his schedule.

\* *Coram* LYNCH, J.

presented said bills to be bills for value, and also had made other wilful misrepresentations as to the state of his affairs, and thereby got large credit. The bankrupt was a provision merchant, and Army and Navy contractor. His liabilities, as appeared by the schedule, were £42,880, and his assets consisted merely of some plant necessary to carry on his business, debts due to him, and household furniture, but no stock in trade; leaving net liabilities £25,995. The dealings mentioned in the schedule commenced in June 1858, at which time the debts due by the bankrupt were £8770, and his assets £1690. In the five months previous to his stoppage, the bankrupt had received and disbursed £242,102. The amount of bills discounted from December 1859 to May 1860 was £82,306; and, of this amount, £32,205 consisted of accommodation bills, which the bankrupt had represented to creditors to be for value. Most of these accommodation bills were drawn upon the father of the bankrupt, who carried on the same trade in Glasgow. As the bills drawn on the bankrupt's father arrived at maturity, they were retired by means of accommodation bills drawn upon other parties. The special losses in the two years were put down at £7341. Part of the said sum of £7341 was the loss on a contract for salt provisions, taken at 32s., when the market price was 40s., and expense of curing 5s., giving a loss of 13s. per cwt. £1098, another part of said £7341, was the loss on a contract for mess beef. It appeared that the bankrupt purchased beef in the Dublin market at 40s., which he sold in Glasgow and Liverpool at 21s. to 28s. at the utmost. Sundry trade charges were set down at £3000. These, with many other items, constituted the losses which led to the bankruptcy. The bankrupt admitted that a sum of £2400, due to a Mr. Geale, a victualler, consisted of debts contracted in January, February and March 1860, and that it included the amount of two bills on which Geale had put his name, for the bankrupt's accommodation.

In explanation of two statements of his affairs, the one made on the 21st of April last, showing his assets to be £18,000, and his liabilities £6094, and the other made on the 12th of May

1860.  
*Bankcy., &c.*  
*In re*  
 LOCKHART.  
 ———  
*Statement.*



1860.  
*Bankcy., &c.*  
*In re*  
 LOCKHART.  
 —  
*Statement.*

last, and showing his assets, over and above liabilities, to be £3000, the bankrupt stated that, by the liabilities in the first statement, he only meant those which he had to meet between the 21st of April and the 1st of May, and that the second statement was drawn up on the same principle. Mr. Megaw, the trade assignee, proved that the bankrupt had made several representations to him as to the bankrupt's solvency, which induced him to give the bankrupt credit for wheat, in April and May 1860, to the amount of £1000. He also expressed his dissatisfaction at the way the bankrupt's books were kept, and stated that the bankrupt had entered into contracts which could not turn out otherwise than ruinous to him. These statements, as to solvency, the bankrupt said he did not remember. It was proved that the amount of discount on the bankrupt's accounts in the National Bank, from June 1858 to May 1860, was £1160. Mr. Hardy, the manager of the National Bank, deposed that the bankrupt always represented that the bills he was discounting were for value, else the bank would have nothing to say to them. When the first statement (that of April last) was produced to him, he thought it represented the actual state of the bankrupt's affairs at the time, and not the mere requirements for the month. In consequence of the satisfactory nature of the accounts, which he had no reason to doubt, and the explanation of the bankrupt's father, who stated that the bankrupt's position was an excellent one, he (Mr. Hardy) agreed to advance him £2000, to enable him to carry on his monthly contracts with the Government. That amount was overdrawn, and he was very much annoyed at it. The second statement was then furnished. He repudiated the idea that he held out any hope that any further advance would be made until the statement was inquired into. That inquiry was made, after which the bank refused to advance any more money.

*Argument.*

Mr. *D. C. Heron*, for the trade assignee, asked the Court to adjourn the final examination *sine die*, and to refuse protection; and relied upon *In re Keon* (a).

(a) 10 Ir. Eq. Rep. 113.

Mr. *Levy*, for Mr. Geale and another creditor.

1860.  
Bankcy., &c.  
In re  
LOCKHART.  
Argument.

Mr. *James Kernan*, for the bankrupt, submitted that, though the Court might not approve of the conduct of the bankrupt, the justice of the case would be met by passing the final examination, and letting the assignees enter an objection to the certificate. *In re Keon* was a case of forgery, fictitious names having been put on bills.

LYNCH, J.

This case has occupied a good deal of time, but not more than it deserves, for it is a case of very great importance to the mercantile world; a case in which this Court is bound to remember the interests of the mercantile community, and the protection to which it is entitled. Unfortunately, the investigation cannot tend much to the benefit of the creditors, for whom there are very little assets, to go against the enormous liabilities of the bankrupt; but the Court has a public duty to discharge towards the mercantile world, which looks for protection against fraudulent traders coming into the Court, and, as a matter of course, passing through it. In dealing with the case, I shall first take the schedule containing the representations of the bankrupt himself; and looking at those representations, they seem to well warrant the few pertinent observations made by Mr. *Levy* in reference to it. There is in the schedule a statement of the affairs of the bankrupt on the 2nd of June 1858, from which it appears that he then owed debts amounting to £8770, and I should be almost justified in stating that there was not a fraction of assets to meet them. There are put down as good, bad and doubtful debts £3100, and goods in hand to the amount of £1600. There is no such thing, for the goods spoken of are merely the implements by which the bankrupt carried on his trade; and he was utterly without capital to enable him to go on with his trade at that time; so that the state of his affairs in June 1858 was, that he owed £8770, three-fourths of which consisted of accommodation transactions, showing a trade bolstered up and forced on through means of accommodation bills,

1860.  
*Bankcy., &c.*  
*In re*  
 LOCKHART.  
 —  
*Judgment.*

with scarcely a fraction of assets. No doubt it is stated that the bankrupt had large transactions afterwards. But would any man be justified in entering into large and extensive transactions commencing in that way? Mr. *Kernan* has asked if this Court would prevent speculation? It will not. Trade generally has speculation connected with it, and an honest trader may be brought down in the mercantile world and compelled to become a bankrupt. It is for the benefit of trade that legitimate speculation should be encouraged; but that speculation is not gambling, nor risking your neighbour's money, having none of your own to put in peril. In the present case, the bankrupt was obliged to resort to accommodation transactions to take him out of the state of insolvency he was in in June 1858, and then commenced a career of greater accommodation transactions to float him on in the mercantile world, and enable him to come before mercantile people with accommodation bills as if they were legitimate trading transactions. If the case came before the Court on the state of things in June 1858, as disclosed by the schedule, it would call for the greatest condemnation by the Court on a trader who so conducted himself. The bankrupt entered into a large Navy contract in October 1859, speculating on a fall in the price of cattle, when the opposite conclusion might have been more naturally drawn. Is it honest dealing to go into the commercial world and raise money on such speculations? And how was it effected? By accommodation transactions with his father, the representation or pretence being that they were bills for value, and not accommodation kites set up to carry on a false and fictitious trade. On the patent facts set out in the schedule, this Court would not be doing justice to the mercantile world if it did not state that no such schedule could pass here without the strongest condemnation. Unfortunately, accommodation bills are used in trade. It is well known, however, that a man will lose credit if it be understood that he deals in them. To avoid this loss of credit, the bankrupt represented that they were bills for value, and, on the faith of that misrepresentation, he got enormous credit. In April last, he made a statement of his circumstances; and if it was an account of a month's liabilities only, as stated, why make a statement of all his assets? If all

the assets were on one side of the account, why should not all the liabilities be on the other? If such were the case, any man would understand the document. The bankrupt would not pledge his oath that he told Mr. Hardy, of the National Bank, that those were only a month's liabilities. Independent of Mr. Hardy's evidence, the document itself would go to show that it was intended to be a representation of the bankrupt's circumstances at the time; otherwise, what would be the meaning of Mr. Hardy's statements that, if the account were true, the bankrupt was then in a solvent state? That observation would not be applicable to a month's account, and would only apply to a statement meant to show that the bankrupt was in a complete state of solvency. If this view requires confirmation, the statement made in May abundantly supports it; and both documents show that the statement was wilfully and deliberately made, for the purpose of procuring a large loan to himself. Poor men are brought to justice for taking small sums from their neighbours; but to filch money out of another man's pocket by force is a lesser crime than for a man to go into the mercantile world, and put into his pocket money which he knows he never can pay back. The man who represents that he has large transactions for value in the way of trade, and by that means obtains in the mercantile world credit to which he is not entitled, is guilty of a greater offence than stealing money from his neighbour; for such conduct strikes at the root of all confidence in trade, and does great mischief in a mercantile community. Mr. Hardy was made the instrument by which Mr. Megaw was also misled as to the bankrupt's solvency. Having made that statement of his affairs to Mr. Hardy, Mr. Megaw was referred to him, and thus was induced to place confidence in the bankrupt still, though his name had been mentioned in connection with the failure of the Messrs. Rogerson. There was then a wilful, deliberate misrepresentation by the bankrupt, in order to get credit when he was in a state of insolvency, and when he knew that he could not pay his debts from the proceeds of the contracts. That was not honest trading. Under the Bankruptcy Code, the fact of a man having engaged in gambling prevents him passing, or getting a certifi-

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cate; but it is worse than gambling for a man to go into the mercantile world, and raise money which he cannot hope to be able to pay, and to raise it altogether at other people's risk, having nothing himself to lose. Therefore, on the ground of reckless, profligate and dishonest trading, and on the ground of wilful misrepresentation, I am prepared to deal with this case. Is he to pass the final examination? Mr. *Kernan* has said that there is only one case in which I refused to pass the final examination, and that that is a case where there was an absolute forgery committed, in the eye of the law—where fictitious names were put on bills brought into the market. My jurisdiction to adjourn the final examination *sine die* was questioned; but no appeal was taken to my decision. I refused to pass the final examination in that case; I do equally in this case. I feel that I should not be justified, holding the place I do, in giving the bankrupt a certificate, as I do not think, looking at the bankrupt's past conduct and transactions, that he is entitled to the certificate of the Court for his future dealings. I regret to have to adopt that course; for I should be better pleased if I could deal leniently with the case; but my duty to the public compels me to adjourn the bankrupt's examination *sine die*.

Protection refused.

1860.

*Rolls.*

HOMAN v. SKELTON.

(*In the Rolls.*)

May 24, 31.  
Nov. 13.

THE cause petition in this matter was filed for the specific performance of a covenant for renewal, contained in a lease of the 20th of October 1827. The facts of the case, which are very fully stated in the judgment, were shortly as follow:—

Daniel M'Neale, being seised for lives renewable for ever of the lands of Proleek (a part of which called Rosabella Proleek was included in the lease of the 20th of October 1827), made his will on the 22nd of April 1822, whereby he devised all his freehold property in the county of Louth to trustees, on trust to permit his daughter Rosabella, who was his heiress-at-law, to receive the rents and profits for such term, time and space as his said daughter should remain unmarried, or marry with the consent of both his trustees; but in case his said daughter Rosabella should not marry with consent of one or both of his said trustees, then she was to receive only an annuity of £60 for her life, and the residue of the property was to be vested in Government stock for the benefit of her issue;

In 1827, a lessor, as to whom it was disputed whether she was only tenant for life, or was entitled in *quasi* tail for lives renewable for ever, made a lease for her own life, with a covenant that if she should be enabled, either separately or in conjunction with any other person or persons, to grant the said premises for any longer term than was thereby granted, she would, at the request and costs of the lessee, execute

all such further act or acts, &c., for the purpose of granting the premises to him, for any term not exceeding three lives, with covenant for perpetual renewal, on payment of a peppercorn fine on the fall of each life, at the rent thereby reserved, &c., and the lessee covenanted for himself, his heirs and assigns, with the lessor to accept such grant. It was decided by the Court of Appeal (7 Ir. Ch. Rep. 388) that the lessor was tenant in *quasi* tail.

*Semble.*—The covenant was a personal covenant, binding on the lessor during her life, and did not descend with the land.

No claim was made on foot of the covenant during the lifetime of the lessor, who died in 1854. Judgments had been obtained by the petitioners for the same debt against the lessee and R., who was entitled in remainder to the reversion, and who afterwards became entitled to the lessee's interest. After the lessor's death, a petition was filed by creditors of R., in the Incumbered Estates Court, for sale of the reversion, on the ground that the lessor was only tenant for life, or, if she were tenant in *quasi* tail, that she had not barred the entail. The petitioners were made parties in that matter as judgment creditors of R.; and after it was dismissed by the Court of Appeal, they had, in other proceedings in the Landed Estates Court, admitted the right of the respondents, who were devisees of the lessor, and had gone into possession of the lands.—*Held*, that the right to a specific performance of the covenant had been abandoned, and was barred by laches and acquiescence.

A judgment creditor of a tenant may maintain a suit for a renewal.

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and in case of no issue he bequeathed such residue to his right heirs; and in case of his daughter dying unmarried or without lawful issue, he devised Proleek to his nephew, James Wolfe M'Neale, for life, remainder to Donald M'Neale, fourth son of J. W. M'Neale, his heirs and assigns, for ever.

The testator died in 1825, whereupon his daughter Rosabella entered into possession of the lands of Proleek. Donald M'Neale died in 1829, intestate, and leaving his eldest brother, Malcolm M'Neale, his heir-at-law, who died in 1845, having devised his remainder in Proleek to his brother Robert M'Neale.

On the 20th of October 1827, Rosabella M'Neale demised the lands of Rosabella Proleek, containing 30a. 1r. 20p., to James Forde, his heirs and assigns, in trust for J. W. M'Neale, for the life of Rosabella M'Neale, at the rent of £67. 3s. 1d.; and Rosabella M'Neale covenanted that if she should be enabled, either separately or in conjunction with any other person or persons, to grant the said premises for any longer term than was thereby granted, she should and would, at the request and proper costs of the said James Forde, his heirs and assigns, make, do and execute all such further and other act and acts, &c., for the purpose of granting and releasing the said premises to him or them, for any term not exceeding a term of three lives, with covenant for perpetual renewal on payment of a peppercorn as a fine on the fall of each life, at and under the yearly rent thereby reserved, and other covenants in such cases usual; and James Forde covenanted for himself and his heirs, with Rosabella M'Neale, to accept such grant and release, and to execute a counterpart;

In Michaelmas Term 1847, Samuel Reid obtained a judgment against James W. M'Neale, and in the same Term he obtained another judgment against Robert M'Neale. Both judgments were entered up on a joint and several bond and warrant of attorney, executed by J. W. M'Neale and R. M'Neale for the same debt. James W. M'Neale died in 1853, having devised his interest in the lease of the 20th of October 1827 to Robert M'Neale, who was also his heir-at-law; and Rosabella M'Neale died in 1854, without having been married, and having devised her interest to the respondents William Skelton and Philip Skelton.

Some creditors of Robert M'Neale presented a petition in the Incumbered Estates Court, for the sale of the interest devised to Rosabella M'Neale, alleging that she only took a life estate under the will of Daniel M'Neale, or, if she took an estate in *quasi* tail, that she had not barred it. The petition was, on the 21st of April 1858, dismissed by the Court of Appeal, who decided (a) that Rosabella M'Neale took an estate in *quasi* tail, which had been barred by a renewal of 1829. Anne M'Neale, Margaret M'Neale and Maria Frances M'Neale, who were petitioners in this matter, were parties in the proceedings in the Incumbered Estates Court and Court of Appeal. A receiver had been appointed in this Court over the lands, pending the proceedings in the Incumbered Estates Court by George Crawley, a creditor of Robert M'Neale. After the decision of the Court of Appeal, the respondents, on the 22nd of June 1858, obtained an order from Master Lyle to discharge the receiver, and (the tenants having refused to give up possession) they brought an ejectment, recovered possession and let the lands. Some other lands, the property of Robert M'Neale, having been sold in the Incumbered Estates Court, a question of compensation for injury done to the lands of Proleek, by the making of a watercourse on the lands so sold, arose between the creditors of Robert M'Neale and the respondents William Skelton and Philip Skelton; and, from May 1858 to April 1859, certain proceedings took place, in the progress of which Mr. E. Mathews, purporting to act as solicitor for the petitioners as creditors of Robert M'Neale, served notices in which he treated the respondents as owners of the lands of Rosabella Proleek. Ultimately, by an order of Judge Longfield, of the 15th of April 1859, £200 compensation was awarded to the respondents. Those proceedings and notices were relied on by the respondents as an abandonment by the petitioners of the right claimed in this suit. They are set out at length in the judgment. On the 15th of February 1859, Samuel Reid assigned the two judgments to the petitioner Frederick Homan, in trust for the petitioners Anne M'Neale, Margaret M'Neale and Maria Frances M'Neale. In February 1860, the petition in this matter was filed by them, as judgment creditors of

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(a) See *In re M'Neale* (7 Ir. Chan. Rep. 388).



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James Wolfe M'Neale, for a specific performance of the covenant contained in the lease of the 20th of October 1827, against William Skelton and Philip Skelton, the devisees of Rosabella M'Neale, Richard Lucas, the assignee of Robert M'Neale, and Theobald Forde, the representative of the lessee of the lease of the 20th of October 1827.

The principal defences set up by the answering affidavits of the respondents William Skelton and Philip Skelton, and those to which the arguments and judgment are directed, were, first, that the petitioners, as judgment creditors of J. W. M'Neale or R. M'Neale, could not maintain a suit for the specific performance of the covenant. Secondly, that the covenant in the lease of the 20th of October 1827 was a personal covenant, intended to be carried out, if at all, during her lifetime, and was not binding on her heirs or the respondents her devisees. Thirdly, that after the order discharging the receiver, the petitioners, and the other parties acting with them, elected not to take any proceedings to enforce a renewal, and relinquished all claim, considering that the lands were not then worth more than the rent of £67. 3s. 1d.; and that the petition had been filed solely because Judge Longfield had awarded so large a sum in respect of compensation for the watercourse, and on a speculation that, if the suit were successful, that sum would form a fund for the payment of the petitioners, as creditors of Robert M'Neale. Fourthly, laches and acquiescence, and the Statute of Limitations. Fifthly, waste by James W. M'Neale, in making the watercourse through the lands.

Mr. Serjeant *Lawson*, Mr. *Chatterton* and Mr. *Leech*, for the petitioners.

*Argument.*

*Smith v. Shannon* (a) is a conclusive authority as to the right of a judgment creditor to maintain a suit for renewal. As to the construction of the covenant, the principle of law is, that when a covenant is attached to the demise, it is immaterial whether the word "heirs" is used. It runs with the lands, and is binding on the assignee of the grantor and on the assignee of the grantee: *Spencer's case* (b). There were

(a) 3 Ir. Chan. Rep. 462.

(b) 1 Sm. L. C. 23.

mutual covenants in the lease of 1827. A covenant to renew runs with the land: *Roe v. Hayley* (a); *Hyde v. Skinner* (b). There was no waiver or abandonment of the petitioners' rights, under the covenant, by the proceedings in the Incumbered Estates Court and Court of Appeal; for whatever part was taken in these proceedings by the petitioners was taken by them in assertion of a different right and in a different character. They were creditors of Robert M'Neale, as well as creditors of James W. M'Neale. The interests of their two debtors happened to be conflicting, but they were not, therefore, bound to elect against which of them they would proceed. They had a right to make the estates of both available for the payment of their demand. How then can it be said that, by proceeding to realise a fund for the payment of the debts of Robert M'Neale, they abandoned their right to proceed against the estate of James W. M'Neale? The abandonment or waiver of a contract must be clearly proved, to be a defence, even in a Court of Equity. The acts relied on must be done with the intention to waive the contract: *Clarke v. Moore* (c).

The respondents did not recover possession of the lands, under the ejectment, until November 1858. Until then, there was no possession adverse to the petitioners. There was no refusal by the respondents to grant the renewal; and that distinguishes this case from *Walker v. Jeffreys* (d), *Heaphy v. Hill* (e), *Morgan v. Gurly* (f), and *Southcome v. The Bishop of Exeter* (g). Waste, or a breach of covenant by the tenant, is not a valid defence to a suit for renewal: *Trant v. Dwyer* (h); *Brown v. The Marquis of Sligo* (i).

Mr. *Brewster*, Mr. *Sullivan* and Mr. *M'Blain*, for the respondents.

The covenant in the lease of the 20th of October 1827 was

(a) 12 East, 464.

(b) 2 P. Wms. 136.

(c) 1 J. & L. 123.

(d) 1 Hare, 347.

(e) 2 Sim. & St. 20.

(f) 1 Ir. Chan. Rep. 482.

(g) 6 Hare, 213.

(h) 1 Dow., N. S., 125; S. C., 2 Bli., N. S., 11.

(i) 10 Ir. Chan. Rep. 1.

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not binding on the heirs of Rosabella M'Neale. It was binding on her during her life, and the lessee might, during that time, have compelled her to perform it; but it conferred no obligation binding her heirs. No action on it could be maintained at Law against them, and, *a fortiori*, no suit for specific performance could be maintained in Equity: *Platt on Covenants*, pp. 448 and 449. The covenants appear to have been framed designedly with that view; for, in the covenant by the lessee, his heirs are bound, whereas, in the covenant by the lessor, the word "heirs" is omitted. It is therefore a mere personal equity, attaching on the conscience of the party, and not descending with the land: *Sug. Ven. & Pur.*, pp. 612, 613; *Kent v. Stoney (a)*; *Jones v. Kearney (b)*. The doctrine of laches, as established by *Morgan v. Gurley (c)*, *Heaphy v. Hill (d)*, and *Southcome v. The Bishop of Exeter (e)*, forcibly applies to this case. No claim was made during the lifetime of Rosabella M'Neale, from 1827 to 1854; and, after her death, not only was no claim made, but the claim was abandoned and proceedings were taken, which amounted to a disclaimer of the title of the reversioners: *Doe d. Phillips v. Rawlings (f)*.

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THE MASTER OF THE ROLLS.

Nov. 12.  
 Judgment.

The petition in this case has been filed by Frederick Homan, as assignee of a judgment, entered on a bond and warrant of attorney, as of Michaelmas Term 1847, against James Wolfe M'Neale, at suit of one Samuel Reid, and also as assignee of a judgment, of equal date, entered on the same bond and warrant, against Robert M'Neale, for the specific performance of a contract to execute a lease for three lives, with a covenant for perpetual renewal, which contract is contained in a lease made by Rosabella M'Neale to James Forde, and which bears date the 20th of October 1827. The judgments were assigned in February 1859 by Samuel Reid to Frederick Homan. Frederick Homan was a trustee for the other petitioners. James Forde, the lessee in the said lease, was a trustee

(a) 9 Ir. Chan. Rep. 249.

(c) 1 Ir. Chan. Rep. 482.

(e) 6 Hare, 213.

(b) 1 Dr. & War. 134.

(d) 2 Sim. & St. 20.

(f) 4 C. B. 200.

for James Wolfe M'Neale. The facts of the case, so far as they appear to me to be material, are as follow:—Rosabella M'Neale, being seised of the lands of Proleek, in the county of Louth, by indenture, dated the 20th of October 1827, and made between the said Rosabella M'Neale, of the one part, and James Forde (since deceased), of the other part, demised to the said James Forde, and to his heirs, part of the townland of Proleek, in the county of Louth, containing 30a. 1r. 23p., plantation measure, to hold unto the said James Forde, his heirs and assigns, from the 1st day of November 1826, for the life of the said Rosabella M'Neale, at the yearly rent of £67. 3s. 1d. sterling, payable half-yearly, on the days therein mentioned; and the said Rosabella M'Neale did thereby covenant, promise and agree, to and with the said James Forde, his heirs and assigns, that if she, the said Rosabella M'Neale, should be enabled, either separately, or in conjunction with any other person or persons, to grant the said premises for any longer term than was thereby granted, she the said Rosabella M'Neale should and would, at the request and proper costs of the said James Forde, his heirs or assigns, make, do and execute all such further and other act and acts, deed and deeds, for the purpose of granting and releasing the said premises to him or them, for any term not exceeding a term of three lives, with covenant for perpetual renewal, on payment of a peppercorn as a fine on the fall of each life, at and under the yearly rent thereby reserved, and other covenants in such cases usual; and the said James Forde did thereby for himself, his heirs and assigns, covenant and agree, to and with the said Rosabella M'Neale, to accept such grant and release, and to execute a counterpart thereof, as aforesaid. This is the covenant or contract the specific performance of which is sought in this suit. It will be observed that the rent reserved by the said lease was upwards of £2 an acre, which will account for the delay of thirty-three years in seeking to enforce the specific performance of the contract, and which contract would never have been sought to be enforced, except for the order of Judge Longfield, of April 1859, to which I shall hereafter advert.

It appears, from the decision of the Court of Appeal, in the case  
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of *In re M'Neale* (a), that, at the time of the execution of the lease of 1827, Rosabella M'Neale was seised of an estate in *quasi* tail, under a head-lease for lives renewable for ever, and that such estate in *quasi* tail was barred by a renewal of the head-lease in 1829; and Rosabella M'Neale, therefore, had the power, when she made the lease of 1827, of barring such *quasi* estate tail, and making a sub-lease for lives renewable for ever.

Rosabella M'Neale, being seised in *quasi* fee of the immediate reversion of the lease of the 20th of October 1827, made her will, in writing, bearing date the 28th day of October 1853, and thereby, after devising certain other lands situate in the county of Louth, she devised all the rest, residue and remainder of her real and personal estates, situate in the county of Louth, to the respondents William Skelton and Philip Skelton, their heirs and assigns; and the said Rosabella M'Neale died in the year 1854, without having altered or revoked her said will.

The lease of the 20th day of October 1827 was made to the said James Forde, in trust for James Wolfe M'Neale, since deceased. James Wolfe M'Neale being, along with his son Robert M'Neale, indebted to Samuel Reid in the sum of £2510, they, in order to secure the repayment thereof, executed their joint and several bond to Samuel Reid, bearing date the 10th day of November 1847, with warrant of attorney for confessing judgment thereon, in the penal sum of £5020, upon which bond the said Samuel Reid, on the 20th day of December 1847, entered a several judgment in the Court of Queen's Bench, against the said James Wolfe M'Neale, for the said penal sum, and, on the same day, entered a several judgment in said Court against the said Robert M'Neale, for the said penal sum.

By indenture, bearing date the 15th of February 1859 (at which time the respondents William and Philip Skelton were in possession of the lands demised by said lease, adversely to any claim of Samuel Reid, or of the petitioners), and which indenture was made between the said Samuel Reid, of the first part, the petitioners Anne M'Neale, Margaret M'Neale and Maria Frances M'Neale, of the second part, and the petitioner Frederick Homan, of the third part, the said Samuel

(a) 7 Ir. Chan. Rep. 388.

Reid assigned to the petitioner Frederick Homan the said judgment obtained against the said James W. M'Neale, and likewise assigned to him the said judgment obtained against the said Robert M'Neale, and memorials of the said assignments were, on the 14th day of March 1859, duly enrolled. The assignments were in trust for the petitioners Anne M'Neale, Margaret M'Neale and Maria Frances M'Neale; and the assignments were made for the purpose of instituting this suit, as I shall just now explain. James Wolfe M'Neale died in June 1853; and the petitioners allege that his estate, under the lease of 1827, and the contract therein contained, was bound by the judgment against him.

James Wolfe M'Neale made his will, dated the 29th of January 1853, and thereby devised all his estate and interest in the said lands to his son, the said Robert M'Neale.

Rosabella M'Neale was then living, and Robert M'Neale, who was heir-at-law, as well as devisee, of James Wolfe M'Neale, became entitled to the lands for the life of Rosabella, and to the benefit of the contract contained in the said lease of October 1827. The estate and interest in the said lands, of which the said Robert M'Neale became so seised, was, of course, bound by the judgment against him, and was also bound by the judgment on the same bond against his father. The petitioners seek to sustain this suit as assignees of the judgment against J. W. M'Neale, being apprehensive that their having been parties to the proceedings, to which I shall just now refer, in the Landed Estates Court, as creditors of Robert M'Neale, might affect their right to maintain this suit.

Robert M'Neale was discharged as an insolvent debtor, in the year 1854, and all the estate and interest of the said Robert M'Neale, in the said lands, became vested in Richard Lucas, who was appointed assignee by the Insolvent Court. James Forde died in the year 1837, and his heir-at-law is a respondent. Some matters are put in issue by an amendment of the petition, which do not appear to me to be material, from the view I take of the case.

Several grounds of defence have been set up in the affidavit by way of answer, filed by the respondents William Skelton and Philip Skelton, the devisees of the said Rosabella M'Neale. One, at least,

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of those grounds of defence I consider to be sustainable, and I shall refer to the facts on which that defence rests.

Rosabella M'Neale claimed to be entitled to the lands demised by her by the lease of the 20th of October 1827, under the will of Daniel M'Neale, dated the 22nd of April 1822. That will is set out in the report of *In re M'Neale*, reported 7 *Ir. Chan. Rep.*, p. 389. Daniel M'Neale, the testator, was entitled to the said lands, under a head-lease for lives renewable for ever. A question arose as to whether Rosabella M'Neale was entitled to said lands under said will, for her life, or in *quasi* tail. There was a devise over in said will, in the event, which took place, of Rosabella M'Neale dying unmarried, or without issue, to the said James Wolfe M'Neale, for life, with remainder to Donald M'Neale, fourth son of James Wolfe M'Neale, his heirs and assigns. Donald M'Neale having died without issue, Malcolm M'Neale, his eldest brother, became entitled to whatever estate or interest Donald M'Neale had, as his heir-at-law. Malcolm M'Neale died in 1845, and devised all his estate and property to the said Robert M'Neale. James Wolfe M'Neale having died in 1853, it became the interest of the creditors of Robert M'Neale to contend that Rosabella M'Neale was only entitled to a life estate, under the will of Daniel M'Neale; and some of those creditors having filed the petition in the Incumbered Estates Court, set forth in the answering affidavit, an absolute order for a sale of the part of the lands of Proleek, demised by the lease of the 20th of October 1827, was made, the creditors not claiming that the lease should be sold, but insisting that it had determined, on the ground that Rosabella M'Neale was only tenant for life, and that the said lease, and the contract sought by this petition to be enforced, had determined by her death, and that Robert M'Neale was entitled to the lands, discharged of said lease and contract, as devisee of the heir-at-law of the remainderman Donald, to whom the devise was made by the will of 1822. This case was, of course, wholly inconsistent with the claim now made by the petitioners, so far as they are judgment creditors of Robert M'Neale; the present claim being, that they are entitled to have a specific performance of the contract in said lease, entered into by Rosabella M'Neale; and their

case in the Landed Estates Court being, that the lease and the contract were at an end by her death.

The respondents William Skelton and Philip Skelton, who insisted, in the Landed Estates Court, that Rosabella was tenant in *quasi* tail, and not tenant for life, and that she had barred the *quasi* estate tail in 1829, and that they were entitled, under his will, obtained a ruling from Judge Longfield, dated the 13th of November 1857, whereby he ordered that the order for the sale should be discharged, and that the petition, as to the lands called "Rosabella Proleek," which were the lands demised by the lease of 1827, and also as to certain other lands, should be dismissed. That decision was affirmed by the Full Court, and ultimately by the Lord Chancellor and Lord Justice of Appeal, who decided that Rosabella M'Neale was tenant in *quasi* tail, and that she had barred the entail; and that the said William Skelton and Philip Skelton, two of the respondents in this matter, were entitled to said lands, under her will. The order of the Court of Appeal was made on the 21st of April 1858, and the case is reported, as I have stated, in the 7 *Ir. Chan. Rep.* The present petitioners, Anne M'Neale, Margaret M'Neale and Maria Frances M'Neale, were parties to the said appeal, and bound thereby. In what right they were parties I do not know; but the ingenious plan of obtaining assignments of the two judgments in February 1859, after the decision of the Court of Appeal, was to endeavour, by suing in a new right, to avoid the effect of their proceedings in the Incumbered Estates Court and Court of Appeal. Now, of course, it was open to the present petitioners, and to the other creditors of Robert M'Neale, to have applied to the Landed Estates Court, to sell the estate and interest of Robert M'Neale, under the lease of 1827, and the covenant therein contained, after the title of Rosabella M'Neale was established by the decision of the Court of Appeal; but I presume that they thought it then unadvisable to do so, having regard to the lease having demised only 30a. 1r. 23p., and the rent reserved being £67. 3s. 1d.

George Crawley, one of the petitioners in the Incumbered Estates Court, had filed his cause petition in the Court of Chancery, on or

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about the 12th of January 1857, against Robert M'Neale and Richard Lucas, his assignee under the Insolvent Act, for the purpose of raising, out of the estate and interest in said lands, sought to be sold in the Incumbered Estates Court, the amount of a certain judgment debt due by the said Robert M'Neale; and, on the 17th of August 1857, one Robert Fagan was appointed receiver over the said estate and interest, the property of the respondents in this matter, William and Philip Skelton, who had not been made parties to such proceedings. The said William Skelton and Philip Skelton having discovered such proceedings, they moved before Master Lyle to discharge the receiver. Master Lyle made an order on the said motion, on the 22nd of June 1858, and thereby ordered that the receiver should be discharged, and that he should pay to William and Philip Skelton the rents which he had received out of the said lands, and he ordered the petitioners in the said matter to pay the costs of the motion. The respondents William and Philip Skelton were unable, notwithstanding the said order, to obtain possession of the said lands, and were obliged to bring ejectments in the Superior Courts against the occupying tenants, and were put to large costs and expense, which have never been repaid. The said respondents William and Philip Skelton having, at last, got possession, and no claim having been put forward for a performance of the covenant in the lease of 1827, they let the lands to one Launcelot Coulter, at the rent of £75, for one year from the 1st of November 1858. The title of the said William and Philip Skelton was thus distinctly adverse to the claim of any persons claiming under the covenant in the lease of October 1827. The said William and Philip Skelton, on the 1st of June 1859, caused advertisements to be inserted in the public newspapers, and caused hand-bills to be posted, for a letting of the said lands, from the 1st of November 1859, and which advertisements were inserted and hand-bills posted before the letter of the 11th of June 1859, to which I shall just now advert. It is difficult to understand on what principle, on the facts I have now stated, Robert M'Neale's creditors, including the petitioners, wholly disavowing, in the Incumbered Estates Court and before the Court of Appeal, the title of Rosabella M'Neale to make the lease of 1827,

for a longer period than her own life, and wholly disavowing the title of the landlords and reversioners, the present respondents William and Philip Skelton, and allowing the receiver to be discharged by Master Lyle's order, and an ejectment to be brought, and possession to be taken thereunder, prior to the 1st of November 1858, and allowing a lease to be made by the said William and Philip Skelton, that those creditors should now allege that the right to enforce performance of the contract subsists. In fact there was no intention to seek a renewal; all notion of the kind was abandoned, until some circumstances took place in the Incumbered Estates Court, which led to this petition, which I shall now state.

Certain other lands, the property of Robert M'Neale, were sold in the Incumbered Estates Court, and a sum of £1008. 10s. 4d., part of the proceeds of such sale, was retained by said Court, as and for the value of the mill-race or watercourse constructed through the lands of Proleek, for the purpose of indemnifying and compensating the owners of said lands for the damages occasioned thereto by reason of the said watercourse; and the said respondents William and Philip Skelton, having been declared the owners of that part of said lands of Proleek called Rosabella's Proleek, which are the subject of this suit, and which were demised by the lease of October 1827, they thereupon became entitled to a proportional part of the said sum, in respect to that portion of the said mill-race which runs through said part of the lands called Rosabella's Proleek. Edward Mathews, as solicitor for the petitioners who claimed in the Incumbered Estates Court as creditors of Robert M'Neale, and who is solicitor for the petitioners in this suit, caused the solicitor of the said respondents William and Philip Skelton to be served with a notice, bearing date the 20th of May 1858, of an application to be made to Judge Longfield, for an order directing that John Neville, Esq., C. E. (who made the valuation of the watercourse in respect of which the sum of £1008. 2s. 6d. was set apart, out of the moneys produced by the sales in the said matter, as the value of the said watercourse, and which had been vested in Government stock, and then stood to the credit of the said matters), should be at liberty to apportion the said amount (the value of the said watercourse), as between the

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portion of the lands of Proleek called Rosabella M'Neale's Proleek, through which the said watercourse ran (*i. e.*, the part demised by the lease of October 1827), and the other parts of the lands of Proleek through which it also ran, and to report his opinion, as to the said apportionment, to Judge Longfield; and that a further application would be made to the said Judge, that the amount of such apportionment, in respect of Rosabella M'Neale's Proleek, should be paid to the said respondents William and Philip Skelton, who had been declared entitled to the said Rosabella M'Neale's Proleek. Now this notice, served by E. Mathews, then and now solicitor for the petitioners, distinctly recognised the right of the respondents William and Philip Skelton to the possession of the lands. The said notice was afterwards withdrawn, and a further notice of motion was served by the said Edward Mathews, on the 8th of December 1858 (*i. e.*, after Master Lyle had discharged the receiver, and after William and Philip Skelton had obtained possession under the ejectment, and let the lands), on the solicitor of the said respondents William and Philip Skelton, for an order that John Neville, Esq., C. E. (who made the valuation of the watercourse, in respect of which the sum of £1008. 10s. 4d. was set apart, out of the moneys produced by the sale in the matter of the said petition, as the value of the said watercourse, and which said sum had been invested in the purchase of £1008. 2s. 6d. consols, and then stood to the credit of the said matter), should be at liberty to proceed to apportion the said amount, as between the portion of the lands of Proleek called Rosabella M'Neale's Proleek, through which the said watercourse ran, and the other parts of the said lands of Proleek, through which it also ran, and to report his opinion, as to the said apportionment, to Judge Longfield; and that further application would be made to the said Judge, that the amount of such apportionment, in respect of Rosabella M'Neale's Proleek (*i. e.*, the portion demised by the lease of October 1827), should be paid to the said respondents William and Philip Skelton, who had been declared entitled to the said Rosabella M'Neale's Proleek. That notice of Mr. Edward Mathews, then and now solicitor for the petitioners, again recognised the right of the respondents to the

lands, unaffected by any contract. An order on the said last-mentioned notice was made by Judge Longfield, on the 13th of December 1858, whereby it was ordered that Mr. John Neville, C. E., and any other surveyor the said respondents William and Philip Skelton might nominate, should be appointed to determine the value of the watercourse passing through Rosabella M'Neale's Proleek (*i. e.*, the lands in the lease of October 1827), without reference to the sum set apart, and that the rest of the motion should stand over. The said William and Philip Skelton, pursuant to the said order, appointed Christopher Mulvany, Esq., C. E., as their surveyor; and the said John Neville and Christopher Mulvany did not agree as to their estimate of the value of the said watercourse passing through Rosabella M'Neale's Proleek (the property of the said respondents William and Philip Skelton), inasmuch as the said John Neville valued the same at £13. 15s. only, whereas the said Christopher Mulvany considered that the said respondents were entitled to the sum of £200 sterling, or thereabouts, in respect of the said value.

The said Edward Mathews caused a further notice of motion, dated the 8th of March 1859, to be served on the said respondents' solicitor, for an order that, out of the funds in Bank to the credit of the said matter, the sum of £13. 15s. 10d. cash should be paid to the said William and Philip Skelton, in respect to the value of that part of the mill-race which ran through that portion of the lands of Proleek called Rosabella M'Neale's Proleek. So long as Mr. E. Mathews, as solicitor for the petitioners, thought that £13. 15s. 0d. was what would be payable to William and Phillip Skelton, he and his clients were determined not to enforce the contract, but wholly abandoned all claim in respect of it; but, on that motion coming on to be heard before Judge Longfield, on the 15th of April 1859, it was declared that the said respondents William and Philip Skelton were entitled to compensation in respect of the mill-race which ran through that portion of the lands of Proleek known as Rosabella M'Neale's Proleek, at the rate of twenty-three years' purchase, upon the valuation of the water-power, and land taken for the watercourse, as set forth in Mr. Mulvany's report. This order of

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Judge Longfield quite altered the views of Mr. E. Mathews and his clients. So long as it was supposed that £67. 3s. 1d. rent was to be paid for 30a. 1r. 23p., and that only £13. 15s. 0d. was to be paid as compensation, it was not contemplated that the covenant in the lease of October 1827 should be enforced; and the contract was in fact abandoned, and the respondents William and Philip Skelton permitted to go into possession; but a new light broke in on Mr. E. Mathews and the petitioners, when it was discovered that about £200 was about to be paid over by Judge Longfield to the said respondents; and, accordingly, after said order was pronounced, the said Edward Mathews, without any notice to the respondents William and Philip Skelton, applied to Judge Longfield to put a stay upon said order, for the purpose of enabling him, as solicitor for the parties interested in the said estate of Robert M'Neale, to file a cause petition against respondents for the specific execution of the contract contained in said lease of the 20th of October 1827. Judge Longfield, in pursuance of such notice, put a stay on the payment. The first intimation made to the said respondents, of any intention to enforce said contract, was the letter of said Edward Mathews, dated the 11th of June 1859, in the petition mentioned, *i. e.*, about twelve months after the receiver was discharged by Master Lyle. Mr. E. Mathews, apprehensive, I presume, of the effect of his notices, and the acts of himself and the petitioners in the Landed Estates Court, adopted then the ingenious plan of getting an assignment of the two judgments, in February 1860, from Mr. Reid; and Counsel for the petitioners, feeling the difficulty of getting over the question of laches and abandonment, seek to uphold the petition, on the ground that the petitioners are assignees of the judgment against James Wolfe M'Neale, and are not to be affected by anything which took place in the Landed Estates Court, where they claimed as creditors of Robert M'Neale, although the judgment against James Wolfe M'Neale, and the judgment against Robert M'Neale, are for the same debt, and on the same bond.

The respondents William and Philip Skelton state they believe that, after the said order of Master Lyle, of the 22nd of June 1858, had been made, discharging the receiver over the said lands, the

said petitioners, and the other parties acting with them, as aforesaid, did in fact elect and determine not to take any proceedings to enforce a renewal of the said lease, pursuant to the said covenant, and did then relinquish and give up all claim thereto; the said petitioners considering that the said lands were not then worth more than the rent of £67. 3s. 1d. per annum, reserved by the said lease. That statement is, I think, in accordance with the fact; and they state, by said affidavit, that they believe the present petition has been filed against them solely and entirely because Judge Longfield awarded to them so large a sum, in respect of that part of said watercourse running through their lands; and they verily believe that said petition would never have been filed, if the valuation of the said John Neville, C. E., had been adopted, instead of the valuation of Christopher Mulvany, C. E.; and the affidavit further states that this petition is founded on the speculation that, if same be successful, and if the said respondents William and Philip Skelton are, in consequence, compelled to execute a lease for ever of said lands to the petitioners, then the sum so apportioned to the said respondents William and Philip Skelton, by the order of Judge Longfield, will not be paid to them at all, but same will form a fund for the payment of the petitioners, as creditors of said Robert M'Neale; and the affidavit then submits that the course of proceedings adopted throughout towards the said respondents by the petitioners, and the parties in the same interest with them, has been unjust, and such as ought to disentitle them to the interposition of a Court of Equity in their favour.

The first question which arises in this case is, whether the petitioner Frederick Homan, as assignee of the judgment against James Wolfe M'Neale, or as assignee of the judgment against Robert M'Neale, is entitled to maintain this suit; *i. e.*, whether a judgment creditor of a party with whom a contract has been entered into can enforce the performance of the contract? I apprehend that question is not open for argument in this Court, having regard to the decision of Lord Plunket, in *Smith v. Shannon* (a); and I therefore offer no opinion upon it.

The second question arises under these circumstances:—The

(a) 3 Ir. Eq. Rep. 452.

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respondents William and Phillip Skelton, having obtained an order from Master Lyle, in the former Chancery cause to which I have adverted, dated the 22nd of June 1858, to discharge the receiver, who had been appointed over the lands in question, without notice to the said respondents, and the tenants in possession having refused to give up the possession, notwithstanding the discharge of the receiver, the said respondents William and Philip Skelton brought an ejectment, and obtained possession of the lands, prior to the 1st of November 1858; and they then let the said lands to Launcelot Coulter, for one year from the 1st of November 1858, at the rent of £75. William and Philip Skelton being thus adversely in possession, the petitioner Frederick Homan obtained an assignment of the judgment against James Wolfe M'Neale, and of the judgment against Robert M'Neale, in the month of February 1859. The question is, whether the petitioner Frederick Homan, who is trustee for the other petitioners, is at liberty to purchase a right to file a cause petition in Equity, there being no doubt, on the facts of the case, that the assignments of the judgments were obtained for that purpose? In *Story's Equity Jurisprudence*, vol. 2, s. 1040 c, it is said:—"Indeed it has been laid down as a general rule that, where an equitable interest is assigned, in order to give the assignee a *locus standi in judicio* in a Court of Equity, the party assigning such right must have some substantial possession, and some capability of personal enjoyment, and not a mere naked right to overset a legal instrument, or to maintain a suit." This subject was fully considered in the judgment of Lord Abinger, in *Prosser v. Edmonds* (a).

In *Fry on Specific Performance*, pp. 55, 56, where the cases are collected, it is stated that, "Whilst it is clearly lawful to assign a right at the time undisputed, and if, from circumstances afterwards discovered, a necessity arises for litigation against third parties, the assignee may maintain his bill in Equity, yet it is as clearly against public policy to allow of the assignment of a mere naked right to file a bill." In the present case, the assignments of the judgments were obtained by the petitioners in February 1859, for the purpose

(a) 1 Y. & C., Ex. Cas., 481.

of filing this cause petition, the respondents William and Philip Skelton being then adversely in possession. I do not, however, consider it necessary to offer an opinion on this question, as I am of opinion, on other grounds which I shall hereafter state, that this suit cannot be sustained.

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The next question which arises is, whether this suit can be sustained, as Rosabella M'Neale did not by the covenant bind her heirs? I do not consider it necessary to decide that point, although I am of opinion that the intention of the contract contained in the lease of the 20th of October 1827 was, that it should be carried out, if at all, by Rosabella herself, and during her lifetime; a matter of importance, in considering the question of laches, to which I shall hereafter advert.

The next question which arises is, whether the petitioners are precluded by laches or acquiescence, or from the contract having been abandoned, from sustaining this suit? The petitioners could not, of course, have acquired any right to a specific performance, by reason of the assignments of the judgments in February 1859, if the right to enforce the performance of the contract had then been lost by laches, or by the abandonment of the contract by those who, previous to such assignments, represented the interest in the lease of the 20th of October 1827. It may be doubtful whether that lease was a lease for lives renewable for ever, such as was contemplated by the Tenantry Act. It was a lease by Rosabella for her own life, with a contract that, if she should be enabled to grant the premises for any longer term than was thereby granted, she the said Rosabella should and would, at the request and proper costs of the said James Forde, his heirs and assigns, do such further acts as would be necessary for the purpose of granting the said premises to him for any term not exceeding the term of three lives, with covenant for perpetual renewal, on payment of a peppercorn as a fine on the fall of each life. But whether it was a lease within the Tenantry Act or not, I think the contract cannot now be enforced. James Forde, the lessee, was a trustee for James Wolfe M'Neale, and the contract was in effect with James Wolfe M'Neale. Robert M'Neale, who claimed the reversion derivatively under the limita-



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tions contained in the will of Daniel M'Neale, and his creditors, insisted, after the death of James Wolfe M'Neale, that Rosabella M'Neale had only a life estate in the lands under the said will, and that the said Robert M'Neale became, on her death, entitled to the lands; and that the said Rosabella had no power to perform the said contract, having been only tenant for life. Rosabella died in July 1854. The above claim was relied on, until the Court of Appeal decided, on the 21st of April 1858, that Rosabella M'Neale had a *quasi* estate tail under the will of the said Daniel M'Neale. Surely, if a tenant is to be at liberty to allege that the title of the landlord has expired on his death, and that the tenant has thereupon become absolutely entitled to the lands in his own right, assuming that such denial of title in the landlord does not preclude the tenant from enforcing the contract, *Doe v. Rawlings* (a), *Long v. Long* (b), it is the duty of the tenant, if he seeks to enforce the contract as against the devisee of the landlord, to proceed without any delay, after it has been solemnly decided that the claim of the tenant to the lands is unfounded. If James Wolfe M'Neale, or Robert M'Neale, had been informed by notice that their right to the performance of the contract was disputed, they or their creditors could not have lain by for any such period as has been permitted to elapse in this case. What has taken place is quite as strong a disavowal of the liability of the respondents William and Philip Skelton to perform the contract, as any notice which could have been served. The creditors seek to account for their delay, by the fact that they had insisted that Rosabella had no title enabling her to perform the contract, she being, as they alleged, only tenant for life, and that the lease of October 1827, and the covenant therein contained, expired on her death in July 1854. The Lord Chancellor and the Lord Justice of Appeal decided, in April 1858, that Rosabella was tenant in *quasi* tail; and it followed from that decision that Rosabella could, in her lifetime, have executed the covenant in the said lease of October 1827. The petitioners, in a different right from that in which they now sue, were parties to the appeal, and, after the decision of that Court, in effect admitted, in the Landed Estates Court, in the pro-

(a) 4 Com. B. Rep. 188.

(b) 10 Ir. Ch. Rep. 406.

ceedings I have detailed, the right of William and Philip Skelton to the lands, and did not think of raising the question of a right to enforce the specific performance of the agreement until after Judge Longfield made the order of April 1859. The receiver in the former Chancery cause had been discharged in June 1858. The said respondents William and Philip Skelton entered into possession prior to November 1858, after the ejectment was brought; and they entered into a contract for the letting of the lands, for twelve months, in November 1858; all claim on foot of the contract was given up: but when it appeared, by Judge Longfield's order of April 1859, that a sum of £200 or thereabouts was to be awarded to the said respondents William and Philip Skelton, as compensation in respect of the injury done to the said lands by their watercourse, the petitioners adopted the plan of obtaining assignments of the two judgments in February 1859, for the purpose of laying claim to the lands, by reason of the covenant contained in the lease of October 1827, and with the view of obtaining the said compensation. I do not think that, consistently with any principles of Equity, a party can first dispute his landlord's title, and her right to carry the contract into effect; then, when the landlord's title is fully established against him, abandon all claim on foot of the contract, permit his landlord to enter into possession, and deal with the lands, enter into a contract with a tenant, and then seek, under the circumstances I have stated, to set up the abandoned contract, which never would have been set up but for the decision of Judge Longfield in April 1859.

The principal cases on the subject were referred to by the Lord Chancellor, in *Morgan v. Gurley* (a). In that case, his Lordship adopted the language of Vice-Chancellor Wigram, in *Walker v. Jeffreys*, who said, "*Heaphy v. Hill* and *Wilson v. Reid* are direct authorities that, if one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform, the contract between them, and the other contracting party to whom the notice is given makes no prompt assertion of his right to enforce the contract, Equity will

(a) 1 Ir. Chan. Rep. 494.

1860.  
Rolls.  
HOMAN  
v.  
SKELTON.  
Judgment.

1860.  
*Rolls.*  
 HOMAN  
 v.  
 SKELTON.  
 Judgment.

consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the contract, and will leave the parties to their remedies and liabilities at Law."

Surely what took place in the Landed Estates Court in this case, and the acquiescence in the proceedings of William and Philip Skelton, which I have stated, are as strong an intimation to a party who had for years before controverted his landlord's title, as any notice which could have been served. Is it to be said, even if this were a case within the Tenantry Act, that a landlord who takes possession of land under an ejectment is to serve a notice under that Act after he has taken possession? A notice to quit has been held to be a demand under the Tenantry Act. Lord St. Leonards' observations in *Butler v. Portarlington* (a) are important in reference to the proceedings in the Landed Estates Court. But whether the contract in this case falls within the Tenantry Act or not, a contract may be abandoned. Where a tenant holds under an agreement for a lease, pays his rent, has possession of the property and the enjoyment of all the benefits given him by the contract, the effluxion of time will not be a ground for resisting its enforcement. The tenant, in such case, has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right perfected (b); but that principle does not apply where the petitioners allowed the landlord to take possession, four years after the death of the person for whose life the lease was made, and disputed the landlord's title during those four years, adopted a course in the Landed Estates Court which amounted to an abandonment of the contract, and then, when by the order of April 1859 they find that it would be their to interest enforce the contract, seek to get rid of the effect of the abandonment, by obtaining an assignment of the judgment against James Wolfe M'Neale; and they now contend that, although as creditors of Robert M'Neale, they may have abandoned the contract, yet, by the contrivance of getting an assignment of the judgment against James Wolfe M'Neale, that, as creditors of James Wolfe M'Neale, their abandonment of the con-

(a) 1 Dr. & War. 62.

(b) See *Fry on Specific Performance*, 322, 323.

tract as creditors of Robert M'Neale is not to affect them. That the abandonment of a contract is an answer to a suit for specific performance is clear. The cases are referred to, by *Lord St. Leonards* in his work on *Vendors and Purchasers*, 11th ed., pp. 172, 173. I am of opinion that the contract was abandoned in this case; that the right to enforce the contract is barred by *laches*; that what has taken place amounts to more than mere neglect, and that the petition ought to be dismissed.

The petition will be dismissed with costs.

1860.  
Rolls.  
HOMAN  
v.  
SKELTON.  
Judgment.

BRERETON v. BARRY.

May 26, 28.  
June 1.  
Nov. 5.

THE petition was filed by Dilliana Brereton to recover an arrear of jointure, alleged to have been charged in her favour, on the lands in the petition mentioned, by a settlement executed on the 11th of July 1846, previously to her marriage with Ralph Westropp Brere-

A, being  
tenant for life,  
with a power to  
jointure, with  
remainder to  
B, his eldest  
son by his first  
marriage, in

tail, charged a jointure on his second marriage which was not authorised by the power. A and B afterwards joined in barring the estate tail, for the purpose of securing by mortgage a sum advanced to A. The disentailing deed recited the power and the charge of the jointure, and by it the lands were conveyed to a trustee, without prejudice to the jointure, to such uses as A and B should appoint, and in default of appointment to such uses as were subsisting before the execution thereof, so as to secure and restore the former title to the lands. By a contemporaneous deed, to which the jointress was a party, reciting the power and charge of the jointure, and the contract for a loan of £1000 to A and B, to be secured by a mortgage discharged of the jointure, but to the intent only that it should be postponed to the £1000, and the interest on it; and reciting the conveyance by the disentailing deed, subject to the jointure, A and B appointed the lands by way of mortgage to secure the £1000, and the jointress released the lands from the jointure, with a proviso that the release should take effect only for the purpose of postponing the jointure to the £1000. By another deed of the same date, reciting the disentailing deed, and that the lands were charged with £1000, for the use of A, he granted a rentcharge to a trustee for B.—*Held*, that the charge of the jointure being void was not confirmed by the deeds, and that the mortgage deed did not operate as a re-grant of the jointure, the intention being merely to postpone the jointure to the mortgage.

A tenant for life had a power, by deed or will, to charge a jointure, not exceeding £100 a-year, for every £1000 which he should actually and *bona fide* receive with his wife. On his marriage, a life estate of his wife, in a chattel interest in lands, was conveyed to him for life. The tenant for life received, before the date of the will, about £2000 out of the rents of said lands.—*Held*, that the charge by his will of a jointure of £200 a-year was valid if £2000 was received, and that if said sum was not received the jointure should abate proportionably.

1860.  
*Rolls.*  
 BRERETON  
*v.*  
 BARRY.  
 ———  
*Statement.*

ton, or by his will, in pursuance of a power to jointure contained in a deed of the 31st of January 1818.

A former suit had been instituted for the same purpose by the petitioner, which was dismissed, on the ground that the power had not been well executed, as no fortune had been received by Ralph W. Brereton, which would have authorised him to charge the jointure (a). But it having appeared, in the progress of the suit, that certain deeds had been executed on the 22nd of November 1850, by Arthur Brereton, under whom the respondents claimed, which might have operated as a confirmation of the jointure, the petition in that suit was dismissed, without prejudice to the petitioner filing a further cause petition, stating fully the grounds on which she sought to establish her claim.

The petition in this matter was accordingly filed. It relied on the settlement of the 11th of July 1846, as an execution of the power to jointure, and on the deeds of the 22nd of November 1850, which are fully stated in his Honor's judgment, as precluding Arthur Brereton, and the respondents who claimed under him, from questioning the execution of the power by the settlement of the 11th of July 1846; and it also relied on the will of Ralph W. Brereton, as an execution of the power. The will was made on the 18th of March 1855. The following was the part of it relied on as an appointment:—"And whereas, by the marriage settlement executed by me previous to my intermarriage with my present wife, I charged all that and those the farms, towns and lands of Loughglass, &c., with one annuity or yearly sum of £200, as and for a jointure, to be paid to my said intended wife, in case she survived me; now I hereby ratify said arrangement, and I hereby charge said lands and premises with the payment of the annual sum of £200 sterling, to be paid and payable to my dearly beloved wife, as and for her jointure, in case she should survive me, with full power and lawful authority for the said Dilliana Brereton, or her assigns, at all times during her life, to enter into and upon said premises, and, if necessary, to distrain for same, and the distress and distresses there found to be disposed of according to law, and by the sale thereof to pay off and discharge any arrears of said annuity or jointure that may

(a) See *Brereton v. Barry* (10 Ir. Chan. Rep. 36).

be due at the time of such distress, and all costs and expenses that may attend the distraining for same; and I hereby further will and devise to my said wife, Dilliana Brereton, said annuity, yearly rent-charge and sum of £200, as and for her jointure, and to be charged and chargeable on the premises aforesaid." The power in the deed of the 31st of January 1818, the settlement of the 11th of July 1846, and the deeds of the 22nd of November 1850, are fully stated in his Honor's judgment, and in the report of the former case.

1860.  
*Rolls.*  
BRERETON  
v.  
BARRY.  
Statement.

Mr. Serjeant *Lawson*, Mr. *Brewster* and Mr. *Philip Keogh*, for the petitioner.

They contended, first, as in the former suit, that, having regard to the value of the lands of Ardgart, and the rents received thereout by Ralph W. Brereton, the settlement of the 11th of July 1846 was an execution of the power. Secondly; that the effect of the deeds of the 22nd of November 1850 was to convey the estate, subject to the jointure, so as to validate it, either by way of confirmation, *Co. Lit.*, p. 295 *b*, p. 300 *a*, or by way of re-grant; that if a tenant for life, with a power of leasing, make a lease not warranted by the power, and he and the remainderman afterwards join in opening the estate, subject to the lease, the lease is confirmed: *Steele v. Mitchell* (*a*); *Stoughton v. Crosbie* (*b*); and those cases were analogous to the present case. There was full consideration given by the petitioner for a re-grant of the jointure: *Nixon v. Hamilton* (*c*); *Lightburne v. McEvoy* (*d*); *Fitzmaurice v. Sadlier* (*e*); *In re Hartfort* (*f*). Thirdly; that the will of Ralph W. Brereton was a due execution of the power. Such a power might be executed in favour of the wife at different times, provided the limits of the power be not exceeded: 2 *Sug. on Powers*, p. 290, 7th ed.; *Hervey v. Hervey* (*g*). That the will must be taken to speak from the testator's death; and from 1846 until his death, Ralph W. Brereton had received from the rents of the lands of Ardgart a sum sufficient to empower him to charge the

Argument.

(a) 3 Ir. Eq. Rep. 1.

(b) 5 Ir. Eq. Rep. 451.

(c) 1 Ir. Eq. Rep. 46.

(d) 4 Ir. Jur. 179.

(e) 9 Ir. Eq. Rep. 595.

(f) 3 Ir. Jur. 5.

(g) 1 Atk. 561.

1860.  
*Rolls.*  
 BRERETON  
 v.  
 BARRY.

*Argument.*

full amount of £200 a-year, or (if he did not receive £2000) to charge a jointure in proportion to the sum which he had actually received: *Lord Tyrconnell v. The Duke of Ancaster* (a); *Holt v. Holt* (b); *Lane v. Page* (c).

Mr. *Warren*, Mr. *Lawless* and Mr. *James Murphy*, for the respondents, contended that the valuation of the lands of Ardgart, on pretence of which the jointure was charged by the settlement of the 11th of July 1846, was a valuation of the entire interest in the lands, and not of the petitioner's life interest in them, which alone was conveyed by that settlement. It was, therefore, not a *bona fide* settlement, but an evasion of the condition imposed on the power, and absolutely void against the remainderman. It could not, therefore, be confirmed. A voidable deed may, but a void one cannot, be confirmed: *Co. Lit.*, p. 295 b; *Massy v. Batwell* (d); 2 *Sug. on Powers*, p. 308; *Stronghill v. Buck* (e). Even if the deed of 1846 were voidable only, the parties were not apprised of or aware of their rights in the transaction of 1850, and the latter could not, therefore, have the effect of a confirmation. They could not confirm what they knew nothing about: *Murray v. Palmer* (f); *Dunbar v. Tredennick* (g); *Roche v. O'Brien* (h). The cases of *Steele v. Mitchell*, and *Stoughton v. Crosbie*, relied on for the petitioner, were cases where the assets of the tenant for life were liable on the covenants in the void leases; and, in order to avoid circuitry, the Court estopped the parties from denying the validity of the leases: *Carpenter v. Buller* (i). The question as to whether the deed of 1850 amounted to a re-grant was a question of intention. The parties had no intention that it should operate as a re-grant, for they were dealing with what they supposed to be a valid charge, and postponing it to the mortgage: *In re Hartfort* (k). The power might, no doubt, have been executed by the will, but

(a) 2 Ves. 500.

(c) Ambl. 235.

(e) 14 Q. B. 78.

(g) 2 Ball & B. 204.

(i) 8 M. & W. 209.

(b) 2 P. Wms. 648.

(d) 4 Dr. & War. 79.

(f) 2 Sch. & Lef. 485.

(h) 1 Ball & B. 330.

(k) 3 Ir. Jur. 5.

the same condition was annexed to its execution by the will as to its execution by the settlement of 1846; and the question still remained, whether the receipt by the husband of the rents of Ardgart was a sufficient compliance with that condition? The receipt of the income of lands of the wife was not a compliance with that condition, and would not authorise the charge of the jointure: *Doe v. Milborne (a)*.

1860.  
Rolls.  
BRERETON  
v.  
BARRY.  
Argument.

### The MASTER OF THE ROLLS.

The petition in this case has been filed to recover an arrear of jointure, claimed by the petitioner to be due to her out of the lands in the petition mentioned, under the settlement executed on her marriage with Ralph Westropp Brereton, dated the 11th of July 1846, or under the will of the said Ralph Westropp Brereton; and the questions which arise are, first, whether Ralph Westropp Brereton, who was tenant for life of said lands, under a deed of the 31st of January 1818, and who had a power to charge a jointure thereon, upon the conditions stated in that deed, duly executed such power by the settlement of the 11th of July 1846? Secondly; whether it is open to the respondents, who claim under Arthur Brereton, to raise the question that the power was not duly executed? having regard to the provisions contained in certain deeds executed by the said Arthur Brereton, who was the eldest son of Ralph Westropp Brereton by a former marriage, and to which deeds I shall hereafter particularly refer. Thirdly; whether the power to jointure was duly executed by the will of Ralph Westropp Brereton?

Nov. 5.  
Judgment.

A former petition was filed by the present petitioner against the present respondents, to raise the arrears of the said jointure, which petition was referred to William Brooke, Esq., by the Lord Chancellor, under the 15th section of the Court of Chancery (Ireland) Regulation Act. The will of Ralph Westropp Brereton was not put in issue or relied on in that suit, the jointure having been claimed only under the deed of the 11th of July 1846. Master Brooke, made an order on the 27th of October 1859, dismissing that petition, being of opinion that the petitioner had not any fortune authorising the power to be executed by the deed of July 1846,

(a) 2 T. R. 721.



1860.  
*Rolls.*  
 BRERETON  
 v.  
 BARRY.  
 Judgment.

having regard to the terms of the deed of 1818, containing the power. The case was brought before me by way of appeal, and I was of opinion that the Master was right on the point argued before him and before me; but I thought there might possibly be a question whether the respondents, who claimed as volunteers under Arthur Brereton (the eldest son of Ralph Westropp Brereton by a former marriage), could dispute the petitioner's claim to the jointure, having regard to certain deeds executed by Arthur Brereton, and referred to in the former petition. I, however, did not offer any opinion on the point, not having then seen copies of the deeds. That question not having been raised on the former petition, or the question whether the will of Ralph Westropp Brereton was a due execution of the power, and Counsel for the petitioner being desirous to file a new petition, in which the alleged rights of the petitioner should be more fully put forward than in the former petition, I made an order on the appeal motion, dated the 22nd of February 1860, whereby it was ordered that the motion should be refused with costs, to be paid by the petitioner to the respondents, the order to be without prejudice to the petitioner, if so advised, filing a further cause petition, stating fully the ground on which she sought to establish her claim. The present petition has accordingly been filed.

With respect to the first question, I was of opinion on the former petition that Ralph Westropp Brereton had not actually and *bona fide* received £2000, or any fortune, on his marriage with the petitioner, authorising the execution, by the deed of the 11th of July 1846, of the power of jointuring given by the deed of 1818. Having stated the material facts of the case, so far as they relate to the first question, when giving judgment on the former petition, and the grounds of my decision, it is not necessary to repeat them now. The case is not as yet reported, but it will, I presume be reported shortly (a).

It is, no doubt, now stated, which was not alleged when the former petition was heard, that Ralph Westropp Brereton received £200 at the time of his marriage; and it will be necessary to direct a reference to the Master to inquire and report whether Ralph Westropp Brereton received any fortune with his wife, previous to or at

(a) Since reported, 10 Ir. Chan. Rep. 376.

the time of the execution of the deed of marriage settlement of the 11th of July 1846, exclusive of the conveyance of the lands of Ardgart, as therein mentioned. I continue of the opinion expressed on the hearing of the former petition, that the conveyance of Ardgart to Ralph Westropp Brereton for life (the petitioner having only a life interest therein) did not authorise the settlement of the jointure of £200 a-year on the petitioner. The grounds of that opinion are stated in my former judgment.

The second question, however, which is raised for the first time upon the present petition, must be considered. The facts which give rise to that question are as follow:—Ralph Westropp Brereton married his first wife, Ellen Gray, in 1826. She died in 1832, leaving Arthur Brereton the younger her eldest son, and two other sons and three daughters her surviving. Ralph Westropp Brereton married the petitioner, his second wife, in July 1846, and, in contemplation of the said marriage, the settlement of the 11th of July 1846 was executed, which purported to exercise the jointuring power contained in the deed of 1818, in favour of the petitioner. Arthur Brereton the younger attained his age previous to the 22nd of November 1850, that is to say, in March 1849. Under the limitations in the settlement of 1818, Ralph Westropp Brereton was tenant for life of the lands thereby settled, with remainder to Arthur Brereton in tail. Ralph Westropp Brereton was desirous to borrow money, on a mortgage of the said settled lands, and it was necessary, in order to effect that object, that Arthur Brereton should join in the mortgage, and it appears to have been considered necessary by the mortgagee that the petitioner should consent to give priority to the mortgage over her jointure. Four deeds were accordingly executed, on the 22nd of November 1850. The disentailing deed was made between the said Ralph Westropp Brereton and the said Arthur Brereton of the one part, and William John Geary of the other part. It recites the settlement of the 31st of January 1818, and that, by indenture of the 11th of July 1846, Ralph Westropp Brereton, in exercise of the power contained in the deed of 1818, charged the lands with a jointure of £200 for the petitioner. It further recites that the said Ralph Westropp Brereton

1860.  
*Rolls.*  
BRERETON  
v.  
BARRY.  
*Judgment.*

1860.  
*Rolls.*  
 BRERETON  
 v.  
 BARRY.  
 ———  
*Judgment.*

and Arthur Brereton were desirous that the inheritance in fee-simple in the lands should be settled in the manner thereafter mentioned; and after such recitals the indenture witnessed that, for the purpose of barring the estate tail in the lands vested in said Arthur Brereton, the said Ralph Westropp Brereton, and Arthur Brereton, and the said Arthur Brereton, with the concurrence of Ralph Westropp Brereton, as protector of the settlement, conveyed to William John Geary the said lands (particularly described in the deed), to hold to said W. J. Geary and his heirs, discharged of all estates tail, and all remainders over, "and without prejudice to the said yearly sum of £200, by the said indenture of settlement of the 11th of July 1846 limited and secured to the said Dilliana Brereton during her life, as aforesaid, and the aforesaid power of enforcing payment thereof, and to the term of ninety-nine years by the same deed limited to J. P. Molony and F. Jackson, and the trusts thereof," upon the trusts and further purposes in said deed of the 22nd of November 1850 mentioned; that is to say, to such uses as Ralph Westropp Brereton and Arthur Brereton should, by any deed or deeds to be executed as therein mentioned, direct or appoint; and, in default of such appointment, or so far as same shall not extend, to such uses as were subsisting before the execution of the said presents, "so as to secure and restore the former title to the said lands and premises, and every part thereof." There is some obscurity in the last passage, but the object appears to have been that the remainder in tail to the said Arthur should not be barred, except so far as the power given by the said deed to Ralph Westropp Brereton and Arthur Brereton should be exercised; and, in fact, Arthur Brereton derived no benefit from any of the deeds, except so far as the £30 a-year provided for him by one of the said deeds (to which I shall just now refer) was a benefit. The petitioner was no party to the disentailing deed, but all the deeds of the 22nd of November 1850 are to be considered together, being part of the same transaction. A deed of equal date was executed (22nd of November 1850) by and between the said Ralph Westropp Brereton and Arthur Brereton, of the first part, Dilliana Brereton (the petitioner), the wife of the said Ralph Westropp Brereton, of the second part, Anne Williamson of the third part, Frederick Jackson of the

fourth part, and Henry Hopkins Foster of the fifth part. That deed recited the indenture of the 31st of January 1818. It then recited an indenture of the 22nd of January 1844, under which the said Anne Williamson was entitled to a rentcharge of £70. 18s. 9d., charged on said lands in her favour by the said Ralph Westropp Brereton. It then recited the settlement of the 11th of July 1846, and the exercise of the jointuring power by Ralph Westropp Brereton, charging the lands with the jointure of £200 a-year for the petitioner, and the power of distress thereby created. It then recited that Arthur Brereton attained his age on the 18th of March 1849, and it then recited as follows:—"And whereas the said Ralph Westropp Brereton and Arthur Brereton, having occasion for the sum of £1000, have applied to the said Henry H. Foster to lend them the same, which he has accordingly agreed to, upon having the repayment thereof, with interest thereon in the meantime, secured to him by a mortgage of the said lands." The deed then contains a further recital that the lands should be conveyed to the said mortgagee, H. H. Foster, discharged of Anne Williamson's annuity, "and also free and discharged from the said yearly sum of £200, by the said indenture of settlement of the 11th of July 1846 limited and secured to the said Dilliana Brereton (the petitioner) and her assigns, as hereinbefore is mentioned; but as to the said yearly sum, to the end and intent only that the same should be postponed to the said sum of £1000, and the interest thereof, and that the said sum and interest should have priority over and be a prior or superior incumbrance thereto, upon or affecting the said lands." It then recited the deed of equal date, barring the estate tail, and the conveyance thereby to William John Geary, "subject, however, and without prejudice to the said yearly sum of £200, by the said indenture of the 11th of July 1846 limited and secured to the said Dilliana Brereton and her assigns during her life, and to the power for enforcing payment thereof;" and it recited the uses declared by the said deed of equal date, barring the entail; and after such recitals the indenture witnessed that, in consideration of the said sum of £1000 paid to the said Ralph Westropp Brereton and Arthur Brereton by the said H. H. Foster, the receipt whereof they thereby acknow-

1860.  
*Rolls.*  
 BRERETON  
*v.*  
 BARRY.  
*Judgment.*

1860.  
*Rolls.*  
 BRERETON  
*v.*  
 BARRY.  
 —  
*Judgment.*

ledged, the said Ralph Westropp Brereton and Arthur Brereton, in pursuance of the powers in the said disentailing deed of equal date, appointed the lands (particularly describing them) to the said H. H. Foster, subject to redemption on the repayment of the £1000 with interest. The indenture then contained a clause whereby the petitioner released the lands from her jointure of £200 a-year, and all powers and remedies for securing payment thereof, and she joined in conveying the lands to H. H. Foster, discharged of the jointure, and from all powers and remedies for enforcing payment thereof.

The indenture then contains a proviso and agreement that the release by the petitioner of her jointure should take effect only for the purpose of postponing and deferring the said yearly jointure of £200 to the said sum of £1000; so that the £1000 should be taken to be a prior incumbrance, but not otherwise. That deed was executed by Ralph Westropp Brereton, Arthur Brereton, Dilliana Brereton the petitioner, and Anne Williamson. By another deed, of equal date (22nd of November 1850), and purporting to be made by and between the said Ralph Westropp Brereton, of the first part, the said Arthur Brereton, of the second part, and George Stamer Brereton, of the third part, after reciting that, under the deed of the 31st of January 1818, the said Ralph Westropp Brereton hath become, and now is, entitled to an estate for life, with remainder in tail male to his son, the said Arthur Brereton, in the said lands (describing them), the said deed of the 22nd of November 1850 contains the following inaccurate recital of the disentailing deed, of equal date:—"And whereas the said Arthur Brereton being, entitled to an estate in tail of and in said lands, expectant upon the decease of his father, the said Ralph Westropp Brereton, and, having attained his age of twenty-one years, by deed, bearing equal date with these presents, and made between the said Ralph Westropp Brereton and the said Arthur Brereton, of the one, and William John Geary, of the other part, the said Ralph Westropp Brereton and Arthur Brereton, according to their respective estates and interests therein, did grant, convey and assure, unto the said William John Geary, and to his heirs, all that and those the said

several lands thereafter more particularly mentioned, situate in the Queen's County, to hold to the said William John Geary and his heirs, for ever, upon the trusts therein mentioned, freed and absolutely discharged of and from all estates tail of the said Arthur Brereton, and all other estates tail, remainders, reversions, conditions and limitations thereinbefore expectant and depending;" and then follows, as a recital of the contents of the disentailing deed, which is not contained therein, " but, nevertheless, charged with the sums of £1000 and £500, by way of mortgage, for the use of the said Ralph Westropp Brereton; and subject thereto, that the said several lands should go and enure to the use of the said Ralph Westropp Brereton and his assigns, for and during the term of his natural life; and, from and after the decease of the said Ralph Westropp Brereton (and what next follows is also an inaccurate statement of the disentailing deed), "to the use of the said Arthur Westropp Brereton for life, with remainder to his first and other sons in tail male, with divers remainders over, as therein mentioned." And then follows a recital that, in order to make a provision for the said Arthur Brereton, during the lifetime of the said Ralph Westropp Brereton, he the said Ralph Westropp Brereton had agreed to grant to the said George Stamer Brereton one clear annuity or yearly rentcharge of £30, to be paid quarterly, to and for the use of the said Arthur Brereton, during the lifetime of his said father; and, after such recitals, Ralph Westropp granted the rentcharge to the said trustee, for the use of the said Arthur Brereton. Arthur Brereton does not appear to have executed that deed. A fourth deed, of equal date, was executed; but it does not appear to affect the questions in this case.

Arthur Brereton died in November 1858, having previously executed a further disentailing deed, in April 1858, and thereby limited the lands to himself for life, and, after his death, to the respondents, in the manner therein mentioned. The respondents claim as volunteers under Arthur Brereton; and, if he was not at liberty to dispute the petitioner's jointure, neither are they.

It is contended on the part of the respondents that the entire amount of the mortgage money was received by Ralph Westropp Brereton.

1860.  
*Rolls.*  
BRERETON  
v.  
BARRY.  

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Judgment.

1860.  
*Rolls.*  
 BRERETON  
*v.*  
 BARRY.  
 Judgment.

The mortgage deed contains the recital that the £1000 was paid to the father and son ; and there is a receipt indorsed on the deed, signed by both, acknowledging the receipt of the money ; but it appears to me that the recitals in the deed granting the annuity of £30 a-year to Arthur Brereton establish that the £1000 was for the use of Ralph Westropp Brereton alone, and received by him. The affidavit of Mr. Geary is also important on this point. Now, of course, if the jointuring power was not duly executed, and the execution was void, a void instrument cannot be confirmed. But it has been argued, on the part of the petitioner, that the effect of the instruments was, that there was a new grant of the £200 a-year by Ralph Westropp Brereton and Arthur Brereton to the petitioner. I have considered this question with a desire to see sufficient ground to hold that there was a re-grant ; but I am of opinion that there was not a re-grant, and that the effect of the deed of mortgage was only to postpone the jointure for the benefit of Ralph Westropp Brereton, and to enable him to raise the £1000. It never occurred to the parties, so far as I can judge, from a careful perusal of the deeds of November 1850, that the jointure was invalid. The £30 a-year was not granted to Arthur Brereton as a consideration for a confirmation or re-grant of the jointure. The £30 a-year was granted as a consideration for Arthur Brereton joining his father in the mortgage ; and the petitioner was only made a party at the instance of and for the security of the mortgagee. The affidavit of Mr. Geary is important in the case. It is impossible, in considering the transaction of the 22nd of November 1850, not to feel that Arthur Brereton had not adequate and independent advice. There are observations in *Savory v. King* (a), which are applicable to the present case. I cannot come to the conclusion that the petitioner joining with her husband, simply to give precedence to the mortgage over the jointure, made the deed a confirmation of the jointure, if it was void ; or a re-grant of a new annuity, which re-grant was not intended by the son, so far as I can judge, from a perusal of the deeds. The petitioner's Counsel have argued the question not upon the ground

(a) 5 H. L. Cas. 627.

of confirmation, but of a re-grant, feeling the difficulty of contending that, under the circumstances of the case, the execution of the power, if void, could be confirmed; but, even if the execution of the power was not absolutely void, but only impeachable, I do not think, having regard to the authorities, that the petitioner could sustain this suit, by reason of the provisions in the deeds of the 22nd of November 1850. *Lord St. Leonards*, in his treatise on *Ven. and Pur.*, 13th ed., pp. 212, 213, states, "To give validity to a confirmation of a voidable conveyance, the party confirming must not be ignorant of his right; nor, of course, must his right be concealed from him by the person to whom the confirmation is made. He must know the transaction to be impeachable that he is about to confirm; and with this knowledge, and under no influence, he must spontaneously execute the deed; and he must be fully aware not only of the fact upon which the defect of title depends, but of the consequences in point of law; and he must in fact be a free agent, and not under the influence of the previous transaction." I, therefore, am of opinion that there was no confirmation of the petitioner's jointure, and no re-grant of a new annuity. All that was contemplated, taking all the deeds together, was, that the jointure was to be postponed to the mortgage; but it did not thereby acquire any additional validity.

The remaining question is, whether the will of Ralph Westropp Brereton operated as an exercise of the power? It was not contended that the execution of the disentailing deed, of the 22nd of November 1850, extinguished the jointuring power. I had occasion to consider that question in *O'Fay v. Burke (a)*, and I then stated the ground upon which I considered the power was not extinguished. It is contended, on the part of the petitioner, that in determining the question whether the will of Ralph Westropp Brereton operated as an execution of the power, the Court should take into consideration the rents of Ardgart received, from year to year, by Ralph Westropp Brereton, before the execution of the will, and that such rents so received, having, as is alleged, exceeded £2000, Ralph Westropp Brereton was authorised to charge, by his will, a jointure of £200

(a) 8 Ir. Chan. Rep. 244, 245.

1860.  
Rolls.  
BRERETON  
v.  
BARRY.  
Judgment.



1860.  
*Rolls.*  
 BREKETON  
 v.  
 BARRY.  
 Judgment.

a-year. It is contended, on the part of the respondents, that if a property conveyed to a husband for his life does not authorise the execution of a power of jointuring, that the annual receipts of the property, which would probably be spent as they are received, do not authorise its execution; and that those annual receipts do not constitute a sum or sums "actually and *bona fide* received" with the wife, within the meaning of the power. This appears to me to be a question of some difficulty, and it will be right to ascertain the amount of the rents of Ardgart received by the late Ralph Westropp Brereton, previous to the execution of his will. I am of opinion, however, that if £2000 was actually and *bona fide* received out of Ardgart, by Ralph Westropp Brereton, before the execution of the will, the power was well executed by the will; and that if a less sum was received, the power was well executed, to the extent of the sums received; that is, if less than £2000 was received, the jointure of £200 must abate proportionally. It was not necessary, I apprehend, under a power in the terms of the power in this case, that the fortune of the wife should have been received at the period of the marriage. There may be successive executions of a power to jointure, such as is contained in the deed of 1818, in respect of successive portions of the wife's fortune received, from time to time, by the husband: 2 *Sug. on Powers*, 6th ed., vol. 2, p. 310; *Zouch v. Woolston* (a). If £2000, the property of the petitioner, had been received by Ralph Westropp Brereton, in one sum, shortly before the execution of the will, I presume it would not be denied that the jointuring power was well executed by the will. If this be so, it is difficult to understand why the jointuring power could not be duly executed, if the £2000 was received in annual or half-yearly sums, for some years previous to the execution of the will. If portions of the fortune of the petitioner, received from time to time by Ralph Westropp Brereton, previous to the execution of the will, from other sources than the rents of the lands of Ardgart, would have authorised Ralph Westropp Brereton to charge £100 a-year for the jointure of the petitioner, for every £1000 of such fortune so received, it is difficult to understand why the fact of such sums

(a) 2 Burrows, 1136.

having been received in respect of the rents of the lands of Ardgart can make any difference. The power authorised Ralph Westropp Brereton, when in possession, to charge the lands with a jointure for such wife or wives as he should marry, not exceeding £100 a-year for every £1000 sterling which he should actually and *bona fide* receive with such woman or women as he should marry. I do not, of course, intend to intimate an opinion that, if I am mistaken on the first point, and that Ralph Westropp Brereton was entitled to charge £200 a-year jointure, by the deed of the 11th of July 1846, valuing the interest in Ardgart, at that date, at £2000, the annual receipts of the rents of Ardgart would have justified the charge of a further jointure in respect of such receipts: nor do I express an opinion that, if £2000 in cash, or in the funds, had been given to Ralph Westropp Brereton, on his marriage, he could first charge a jointure in respect of the £2000, and then, at the end of several years, charge a further jointure in respect of the interest or dividends received. In holding the will a due execution of the power to jointure, I assume that the conveyance of Ardgart, by the settlement of the 11th of July 1846, did not authorise the exercise of the jointuring power by that settlement.

To prevent the expense of proceeding with the reference which it will be necessary to direct, and in order to allow the opinion of the Court of Appeal to be taken at once on the three questions of Law, I shall declare on the order my opinion on the first and second questions, and I shall also declare that if Ralph Westropp Brereton actually and *bona fide* received out of the lands of Ardgart, previous to the execution of his will, the sum of £2000, the jointuring power was well executed by the will. If it should appear, on the reference, that a less sum was received, the jointure should be reduced accordingly; but, I presume, when the legal questions are finally decided, the parties can ascertain the amount received, without proceeding with the reference. It will be necessary, when directing the reference, also to direct a reference in respect of the allegation in the petition, that, upon the occasion of the petitioner's marriage, she gave to the said Ralph Westropp Brereton £200 in cash, and much valuable plate and other household effects. I doubt that the

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*Rolls.*  
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BARRY.  
Judgment.

1860.  
*Rolls.*  
**BRERETON**

**BARRY.**

*Judgment.*

plate or household effects can be taken into consideration, but that question can be more satisfactorily decided when the value is known.

As a reference is directed by the order, the costs must be reserved.

I shall make the following order :—

*Order.*

It is ordered and declared, by the Right Hon. the MASTER OF THE ROLLS, that the conveyance of the lands of Ardgart, to which the petitioner was entitled for her life, at the time of the execution of the marriage settlement bearing date the 11th of July 1846, to her late husband, Ralph Westropp Brereton, by the said settlement, for his life, if she should so long live, with a limitation, by the said settlement, to the petitioner, for her life, if she should survive the said Ralph Westropp Brereton, did not authorise the exercise of the jointuring power vested in the said Ralph Westropp Brereton, under the deed of the 31st of January 1818, in the petition mentioned, having regard to the terms of the said jointuring power. And it is further ordered and declared, that the several deeds, dated the 22nd day of November 1850, did not, nor did any of them, amount to a confirmation or re-grant by Arthur Brereton, party to said deeds, of the jointure purporting to be appointed to the petitioner by the said deed of the 10th of July 1846. And it is further ordered and declared, that if Ralph Westropp Brereton, before the execution of his will, dated the 18th day of March 1855, actually and *bona fide* received the sum of £2000, or upwards, after all outgoings, out of the rents of the said lands of Ardgart, the jointuring power of the deed of the 31st of January 1818 was duly executed by the said will. But it not clearly appearing what the amount of said rents, so received by the said Ralph Westropp Brereton, was, it is further ordered, that it be referred to William Brooke, Esq., the Master of this Court, in rotation, to inquire and report the net amount of the rents of the said lands of Ardgart actually and *bona fide*

received by the said Ralph Westropp Brereton, from the 11th of July 1846, being the date of the said marriage settlement, down to the 18th of March 1855, the date of the said will, after all outgoings; and also to inquire and report the net amount of the rents of the said lands of Ardgart, actually and *bona fide* received, by the said Ralph Westropp Brereton, from the date of the said will to the date of the death of the said Ralph Westropp Brereton, after all outgoings; but the Court doth not at present decide whether or not the rents received by Ralph Westropp Brereton, after the date of his will, are to be taken into calculation. And the petitioner having alleged, by the 28th paragraph of the petition, that, upon the occasion of her marriage, she gave to the said Ralph Westropp Brereton £200 in cash, and much valuable plate, and other household effects, it is further ordered, that it be referred to the Master to inquire and report whether the said petitioner did, upon the occasion of her marriage, and at what date particularly, give to the said Ralph Westropp Brereton £200, or any other and what sum, and whether she gave to the said Ralph Westropp Brereton, on the occasion of her marriage, and at what date particularly, any plate and household effects, and, if so, the value and particulars of such respectively: and the Court doth reserve further order, and the question of costs.

1860.  
*Rolls.*  
**BRERETON**  
*v.*  
**BARRY.**  
*Order.*

1860.

*Rolls.**May 1, 4.**Nov. 7.*

## SCOTT v. SCOTT.

Bequest of the interest of £500 to A for life, and as to the principal, after the decease of A, and as "to all other property belonging to me, that I may die seised and possessed of or entitled unto, in trust, for the use, benefit and behoof of" B and her children, "without the control or intermeddling of her husband, and to be paid in such manner as my said trustees shall in their discretion think fit."—*Held*, that B took a life interest in all the property, with remainder to all her children born in A's lifetime, before and after the death of the testatrix.

*Statement.*

MARY KEARNEY, being entitled to two sums of £400 and £100 charged on lands, and being possessed of certain Waterford Bridge debentures, and other property, made her will on the 24th of December 1832, by which she desired that all her debts should be paid as soon as convenient after her decease; and she devised all her property to two trustees, upon trust to pay certain legacies, and upon further trust, to pay "to my sister Catherine Kearney the interest of £500 to which I am entitled under my father's settlement (and which interest is now paid to me by the representatives of my late brother William Kearney and Mr. Alcock of Wilton), for and during the term of her natural life; and, as to the principal thereof, from and after the decease of my sister, and as to all other property belonging to me, that I may die seised and possessed of or entitled unto, in trust and for the use, benefit and behoof of my niece Hannah (Maria) Scott and her children, without the control or intermeddling of her husband, and to be paid at such times and in such manner as my said trustees shall in their discretion think fit." Mary Kearney died shortly afterwards, leaving her sister Catherine Kearney and her niece Hannah Scott surviving. Hannah Maria Scott had, at the death of the testatrix, three children, and she had four children born after the death of the testatrix. Hannah Maria Scott died on the 16th of August 1858; Catherine Kearney died in November 1858. The interest of the £500 was paid to Catherine Kearney during her life, and the interest of the debentures was paid to Hannah Maria Scott during her life.

The petition was filed by James Sheppard Scott, one of the children of H. M. Kearney, born at the death of the testatrix; and the question now discussed at the hearing was, what interest

Hannah M. Scott took in the £500 charge and Waterford Bridge debentures?

1860.  
Rolls.  
SCOTT  
v.  
SCOTT.  
Argument.

Mr. *Brewster*, Mr. *Blake*, Mr. *Leslie* and Mr. *A. Keogh*, for the petitioners, and the children of H. M. Scott, born at the death of the testatrix.

H. M. Scott, and the children born at the death of the testatrix, took as joint tenants: *Wild's case* (a). The rule in *Wild's case* was modified in *Crockett v. Crockett* (b); *Audsley v. Horn* (c). But there is nothing in this will to show an intention that the parent should take only a life estate. The words are, "to be paid at such time and in such manner as my trustees shall in their discretion think fit." To whom was it to be paid? To Hannah M. Scott, and her children. They took *eo instanti* at the death of the testatrix. It was then that the discretion of the trustees was to be exercised, and therefore the objects to take were to be ascertained then: 2 *Jarman on Wills*, pp. 335, 336; *Gordon v. Whieldon* (d); *Buffar v. Bradford* (e); *Paine v. Wagner* (f); *Bustard v. Saunders* (g); *Sutton v. Tone* (h); *Mason v. Clarke* (i); *De Witte v. De Witte* (k); *Cator v. Cator* (l).

Mr. *Sullivan* and Mr. *Arthur Close*, for the children born after the death of the testatrix.

H. M. Scott took a life interest, with a power of appointment among all her children, whether born before or after the death of the testatrix, or she took a life interest with remainder to her children as tenants in common: *Audsley v. Horn* (m); *Ward v. Gray* (n). The trustees are to pay the legacy to the separate use of H. M. Scott. That has been held to be inconsistent with the parent taking with her children as joint tenant: *Morse v.*

(a) 6 Rep. 17.

(b) 2 Ph. 553.

(c) 26 Beav. 195; on appeal, 6 Jur., N. S., 205.

(d) 11 Beav. 170.

(e) 2 Atk. 220.

(f) 12 Sim. 184.

(g) 7 Beav. 92.

(h) 6 Jur. 234.

(i) 17 Beav. 126.

(k) 11 Sim. 41.

(l) 14 Beav. 463.

(m) *Ubi sup.*

(n) *Ubi sup.*

1860.  
Rolls.  
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*Morse (a); Mason v. Clarke (b); Vaughan v. The Marquis of Headford (c); Crawford v. Trotter (d); French v. French (e).* As to the £500, in which a life interest was bequeathed to Catherine Kearney, it is clear that all the children born at the period of distribution, i. e., the death of Catherine Kearney, are entitled: *Jeffery v. De Vitre (f)*; and the same construction must be put on the word "children," in respect of the bequest of the Waterford debentures, which was immediate, without the intervention of a preceding life estate: *Ridgeway v. Munkittrick (g).*

Mr. Serjeant Lawson and Mr. Tandy, for the trustees.

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THE MASTER OF THE ROLLS.

Nov. 7.  
Judgment.

The question which arises in this case is, the construction to be put on the will of Mary Kearney deceased, dated the 24th of December 1833. Mary Kearney was possessed of a sum of £400 and of another sum of £100, which constitute the £500 in her will mentioned, and was also possessed of certain Waterford Bridge debentures; and being so possessed, she made her will, bearing date the 24th of December 1833, whereby she devised all her property to two trustees, on the trusts therein mentioned; and after certain trusts not material in the present case, the will proceeded to declare the trusts thus: "and, to my sister Catherine Kearney, the interest of £500, to which I am entitled under my father's settlement (and which interest is now paid to me by the representatives of my late brother William Kearney, and Mr. Alcock of Wilton), for and during the term of her natural life; and as to the principal thereof, from and after the decease of my sister, and as to all other property belonging to me, that I may die seised and possessed of, or entitled unto, in trust and for the use, benefit and behoof of my niece Hannah Scott and her children, without the control or intermeddling of her husband, and to be

(a) Sim. 485.

(b) 17 Beav. 126.

(c) 10 Sim. 639.

(d) 4 Mad. 361.

(e) 11 Sim. 257.

(f) 24 Beav. 296.

(g) 1 Dr. & War. 84.

paid at such times and in such manner as my said trustees shall in their discretion think fit."

The testatrix died a few days after the date of her will, leaving her sister the said Catherine Kearney; and her niece Hannah Maria Scott (in the will called Hannah Scott), her surviving. Hannah Maria Scott had, at the death of the testatrix, three children; namely, the petitioner James Sheppard Scott, Joseph Scott and Elizabeth Maria Scott; but she had four more children, namely, Hannah Maria Kearney Scott, Sheppard Thomas Scott, Josephine Mary Scott, and Gilbert Thomas Scott, born after the death of the testatrix. Hannah Maria Scott died on the 16th of August 1858, in the lifetime of the said Catherine Kearney, and the said Catherine Kearney died in November 1858. The interest of the £500 was paid to Catherine Kearney in her lifetime, and the interest of the Waterford Bridge debentures was paid to Hannah Maria Scott in her lifetime, on the assumption that she was entitled to such interest for her life, and that none of her children had any claim during her life; but of course that cannot affect the question which arises on the construction of the will.

Counsel on the part of the petitioner contended that the petitioner, and his brother Joseph Scott and his sister Elizabeth Scott, who were the only children born in the lifetime of the testatrix, became entitled, on her death, with their mother Hannah Maria Scott, to the Waterford Bridge debentures, either as joint tenants or tenants in common; and Counsel for the petitioner also contend that the petitioner, and his said brother and sister, born in the lifetime of the testatrix, became entitled to the £500 on the death of Catherine Kearney, their said mother having died in the lifetime of Catherine Kearney; and they contend that the four children born after the death of the testatrix are entitled to no share either of the Waterford Bridge debentures or of the £500.

I do not concur in the argument of the petitioner's Counsel that, according to the true construction of the will of Mary Kearney, the petitioner and his brother and sister, born in the testatrix' lifetime, are entitled to the £500, to the exclusion of the four

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SCOTT.  
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1860.  
*Rolls.*  
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other children born during the lifetime of Catherine Kearney, the tenant for life. Mr. *Jarman*, in his *Treatise on Wills*, 2nd ed., vol. 2, p. 127, states:—"Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. Thus, in the case of a devise or bequest to A for life, and, after his decease, to the children of B, the children, if any, of B, living at the death of the testator, together with those who happen to be born during the lifetime of A, the tenant for life, are entitled, but not those who may come into existence after the death of A." The cases referred to by Mr. *Jarman* are in accordance with his statement of the law. Now without reference to the question which arose in *Audsley v. Horn*, *Ward v. Gray*, and cases of that class, to which I shall just now refer, I do not understand why any of the seven children in this case, all of whom were born during the lifetime of Catherine Kearney, the tenant for life, are to be excluded, so far as relates to the £500.

If Hannah Maria Scott had survived Catherine Kearney, it would have been necessary, with reference to this sum of £500, to have considered *Audsley v. Horn*, *Ward v. Gray*, and that class of cases, in order to determine whether Hannah Maria Scott would have been entitled to a life interest in the entire of the £500; but, as she died in the lifetime of Catherine Kearney, the decision of that question would have been unnecessary, so far as the bequest of the £500 is concerned; and I do not understand, having regard to the cases referred to by Mr. *Jarman*, in the passage I have read from his work, why you are to exclude any of the seven children, so far as relates to the bequest of the £500, they all having been born in the lifetime of Catherine Kearney, and before the period of distribution. It will, however, I think, be necessary to decide the question which arose in *Audsley v. Horn*, and that class of cases, as the construction to be put on the will, as to the £500, may assist in the construction of the other bequest. With respect to the Waterford

Bridge debentures, the question which arises is, in some respects, different from that which arises as to the £500. Where there is an immediate gift to children (*i. e.*, a gift to take effect in possession immediately on the testator's decease), it comprehends only the children living at the testator's decease: *Jarman on Wills*, 2nd. ed., vol. 2, pp. 126, 127. If, therefore, as to the Waterford Bridge debentures (the gift of which was preceded by no life interest in Catherine Kearney), Hannah Maria Scott and her children were to take either as joint tenants or tenants in common, the four children born after the death of the said testatrix would be excluded; and it is, therefore, necessary, as to those debentures, to consider the question which has been argued before me, as to the construction of the general bequest (which included those debentures), "for the use, benefit and behoof of my niece Hannah Scott, and her children, without the control or intermeddling of her husband."

It is impossible to reconcile all the cases, as to the effect of a bequest to a parent, and his or her children. One of the most recent cases on the subject is *Audsley v. Horn (a)*. In that case, the words of the will were:—"I leave Hansard-place to my daughter Mary Rossiter, during her life, and, at her death, to her daughter *Amelia Rossiter and Amelia Rossiter's children*; but, if they should die without issue, in that case, the property to be divided between William Hansard, John Tuttle and John Larry and Maria Larry." Amelia had no children at the date of the will, or at the date of testator's death, or at the date of the death of Mary Rossiter; and it was contended that the bequest was either a *quasi* estate tail in Amelia Rossiter, or that it was an estate to Amelia and her children as joint tenants; and that, upon that assumption, as there was no child alive at the time when the gift took effect, Amelia took the whole absolutely. Sir J. Romilly, in giving judgment, stated, amongst other matters, as follows:—"Upon a review of the whole of the cases upon the subject, I think that, setting aside some contradictory decisions, which it is not very easy to reconcile, the tendency in modern decisions has been, in cases like the present, to hold that, in personalty, the bequest gives an interest

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(a) 26 Beav. 195.

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*Rolls.*  
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 SCOTT.  
 Judgment.

for life to the mother, with an interest in remainder to the children. Thus, in *Crawford v. Trotter*, a bequest to one and her children was held to give an interest for life to the mother, with remainder to her children; and, in *Morse v. Morse*, a bequest of a sum of money to the testator's daughter, and her children, was held to give an interest for life in the daughter, with remainder to all her children. I certainly cannot say that cases are not to be found in the books which it is not easy entirely to reconcile with this view of the subject; but I think that the view I have stated is that which is most consistent with the line of modern cases, and their tendency, and generally most in accordance with the spirit and intention of the testator in those cases. I also find that I have, upon two former occasions, adopted the same view, viz., in *Dawson v. Bourne*, and in *Jeffery v. De Vitre*." The decision in *Audsley v. Horn* was affirmed on appeal (b).

In the case of *Ward v. Gray* (a), reported in the same volume of *Beavan*, a question arose as to the effect of a bequest to a mother and her children. The bequest in the fourth codicil in that case was, to "Mrs. Horatia Ward and her children;" and there was a bequest in the fifth codicil to "Mrs. Horatia Ward and her family." It is strange that, in that case, *Audsley v. Horn* was not referred to; nor does Sir J. Romilly appear to have recollected it. In giving judgment, p. 493, he said:—"There is still one remaining question put to me by this special case, namely, what is the nature of the interest taken by the plaintiff (Mrs. Horatia Ward) and her children in this bequest? I cannot find any distinct authority on this subject; and, following the opinion of Lord Cottenham, in *Crockett v. Crockett*, which this case closely resembles, I am of opinion, first, that the plaintiff and her children do not take as joint tenants; and next, adopting one of the alternatives suggested by the Lord Chancellor, I am of opinion that the plaintiff takes an estate for life in the fund, with a power of appointment amongst her children, and, in default of appointment, and subject to her life estate, the children take the estate equally amongst them; and I will answer the case accordingly." Now it does not appear to me

(a) 29 L. J., N. S., Ch., 20.

(b) 26 Beav. 485.

to be material, in the present case, to consider whether the view taken in *Audsley v. Horn*, or in *Ward v. Gray*, is the correct view; because, according to the opinion of Sir J. Romilly, in the latter case, the power was to appoint *amongst* the children; and, as the will of Hannah Maria Scott excluded many of the children, it would have been an invalid appointment; and, therefore, I apprehend, according to either of the decisions of Sir J. Romilly, the seven children in the present case would take.

The observations of Sir J. Romilly, in *Mason v. Clarke* (a), do not appear very reconcileable with *Ward v. Gray*, as there were children living at the death of the testator in *Ward v. Gray*. In *Crockett v. Crockett* (b) it was laid down by Lord Cottenham, "that in such case (*i. e.*, a gift to A and her children) a very slight indication of intention that the children should not take jointly with the mother has been thought sufficient to enable the Court to decree a life estate to the mother, with remainder to her children." Now, in the present case, so far as relates to the £500, it is, I think, clear, for the reasons I have already stated, that all the children of Hannah Maria Scott, born in the lifetime of Catherine Kearney (*i. e.*, the seven children), were entitled to to the £500. If this be so, it has been decided in *Jeffery v. De Vitre* (c), that where there was a bequest to a married woman, "for the benefit of herself and such children as she then had, or might thereafter have, by her then husband, free from the control of her husband," the married woman took for life, with remainder to such children. Sir J. Romilly, in giving judgment, said "all the children were intended to take; and this can only be effected by giving a life interest to the mother, and the fund afterwards to the children." The argument of the defendant's Counsel, which was in effect adopted by Sir J. Romilly, explains the grounds of the decision; and those grounds are just as applicable to the case of children born after the death of a testator, but within the lifetime of a tenant for life of the fund. In the present case, if it is clear, which I apprehend it is, that, as to the bequest of the £500 after the death of Catherine Kearney, it included

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(a) 17 Beav. 126.

(b) 2 Phil. 555.

(c) 24 Beav. 296.

1860.  
*Rolls.*  
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*Judgment.*

children born after the death of the testatrix, and during the lifetime of the said Catherine Kearney, it appears to me that the case I have last referred to would apply, and that Hannah Maria Scott would have been entitled to the interest of the £500 for her life, in the event, which did not take place, of her surviving the said Catherine, with remainder, as to the *corpus* of the £500 (after the death of Catherine and Hannah), to Hannah's children. I may further observe that the bequest to Hannah Maria Scott, being without the control of her husband, is in itself, according to one case, an indication of intention that she should take for life. The cases, however, on this point conflict: *Jarman on Wills*, 2nd ed., vol. 2, p. 335. In either view of the case, therefore, whether on the authority of the cases referred to by Mr. *Jarman*, in the passage I have read, or on the authority of the cases of *Audsley v. Horn* and *Ward v. Gray*, and the case in 24 *Beavan*, the seven children are entitled to the £500. If the seven children are entitled to the £500, there are many cases which establish that the same construction should be given to the general bequest, which included the Waterford Bridge debentures. It would, I think be difficult to hold that, as to the £500, Hannah Maria Scott was entitled for her life, if she survived Catherine Kearney, with remainder, as to the *corpus* of the fund, for her children, and that the same words should receive a different construction as to the general bequest. I am, therefore, of opinion that the seven children are entitled both to the £500 and to the debentures.

I sent in an order, shortly after the Court rose, last Sittings, declaring very precisely in the order the rights of the parties; but I have now stated the grounds of my decision, as it may be satisfactory to the parties. If there is any desire to appeal, I shall have the date of the order changed to this day.

1860.  
Rolls.

JOYCE v. HUTTON.

June 1, 2.  
Nov. 2.

THE facts of this case appear sufficiently from the judgment. The question was, whether a post-nuptial settlement, of the 18th of January 1850, was voluntary or for valuable consideration?

Mr. Sullivan and Mr. G. O. Malley, for the petitioners.

Mr. Sherlock and Mr. Loughnan, for the respondent.

*Pulvertoft v. Pulvertoft* (a); *Heap v. Tongue* (b); *Blake v. French* (c); *Roe v. Mitton* (d); *Scott v. Bell* (e); *Ball v. Bumford* (f); *Clerk v. Nettleship* (g); *Currie v. Nind* (h); *Goodright v. Moses* (i); *Parker v. Carter* (k); *Butterfield v. Heath* (l); *Milliken v. Kidd* (m); *Law v. Warren* (n); *Fitzmaurice v. Sadleir* (o), were cited.

THE MASTER OF THE ROLLS.

The petition in this case prays that a conveyance, dated the 18th of December 1850, made by the father and mother of the petitioners,

survivor of A and B. There was issue; and by deed reciting that A, in order to further the prospects in life of the children, had consented to assign her life estate for the benefit of the children, and that B, for the like purpose, agreed to assign his reversion, in case he should survive his wife, A, for the considerations aforesaid, and 10s., conveyed her life interest to trustees, in trust to receive the rents during the life of A and B, and apply them for the benefit and maintenance, &c., of the children, in such manner as the trustees might deem sufficient. And it was agreed that the trustees should have full power and control over the property during the life of A and B, free from the control or intermeddling, debts, &c., which at any time might have affected the estate of A and B; and B covenanted that, if he should survive his wife, he would, if called on by the trustees, assign his estate and interest to the trustees, on the said trusts.—*Held*, that the children were not within the consideration, and could not enforce a specific performance of B's covenant to assign his interest.

(a) 18 Ves. 84.

(c) 5 Ir. Chan. Rep. 246.

(e) 2 Lev. 70.

(g) 2 Lev. 148.

(i) 2 W. Bl. 1019.

(l) 15 Beav. 408.

(n) 6 Ir. Eq. Rep. 299.

(b) 9 Hare, 104.

(d) 2 Wils. 356.

(f) 1 Pr. in Chan. 113.

(h) 1 M. & Cr. 17.

(k) 4 Hare, 409.

(m) 5 Ir. Eq. Rep. 396.

(o) 9 Ir. Eq. Rep. 395.

By a marriage settlement, lands were conveyed to trustees, to the separate use of A, the wife, for life; and, in case B, the husband, should survive her, to him for life, and, after the death of the survivor of A and B, in trust to convey to the child or children of the marriage, as A and B should, by deed or will, appoint, and, in default of appointment, to the children equally, and, in default of issue, to the

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*Rolls.*  
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*Judgment.*

and by William Joyce, to the respondent John Hutton, of certain premises in the city of Dublin, and also certain articles, dated the 3rd of December 1850, and made by and between the petitioners' father and mother and the said John Hutton, may be set aside as fraudulent and void as against the post-nuptial settlement of the 16th of January 1850, under which the petitioners claim; and that the father of the petitioners may specifically perform the covenant contained in the said post-nuptial settlement; or that said conveyance, dated the 18th of December 1850, and said articles of the 3rd of December 1850, may stand as a security for the repayment to the said John Hutton of so much money, if any, as shall be found to be fairly due to the said John Hutton, on the taking of the necessary accounts; and, accordingly, that an account may be taken of the sums payable to the said John Hutton, and of the rents and profits which, without wilful default, he might have received out of the said premises, in the city of Dublin, from the 18th of December 1850, and for a re-conveyance, on payment of such sum, if any, as may be due.

The petition is unnecessarily prolix, but the material facts may be shortly stated:—Previous to the month of April 1831, Eliza Mary Nicholson was possessed, for a long term of years, of certain premises in the city of Dublin, and was seised of other property not the subject of this suit; and, being so seised and possessed, a settlement was executed, bearing date the 6th of April 1831, in contemplation of the then intended marriage of the said Eliza Mary Nicholson with Thomas Joyce, whereby the said Eliza Mary Nicholson conveyed to the trustees of the settlement certain lands and premises therein mentioned, and, amongst others, the said premises in the city of Dublin, on trust that they should pay the head-rent, and, subject thereto, for the separate use of the said Eliza Mary, and, in case Thomas Joyce survived the said Eliza Mary, on trust to permit and suffer the said Thomas Joyce to receive the rents for his life, and, from and after the death of the survivor of the said Eliza Mary and said Thomas Joyce, on trust that the trustees should convey the said lands and premises, and said houses in the city of Dublin, to the child or children of the marriage, in

such shares and proportions as the said Eliza Mary Nicholson and Thomas Joyce should, by deed or will, appoint; and, in default of appointment, for the children, share and share alike; and, in default of issue, the said lands, premises and houses were to be conveyed to the survivor of the said Mary Nicholson and Thomas Joyce.

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The marriage took effect, and there were six children of the marriage (the petitioners), three of whom are of age and three of whom are minors. The petitioners allege that the petitioners' father having, about the year 1849, given himself up to habits of intoxication, and the petitioners being apprehensive that petitioners' father would induce the petitioners' mother to join him in some securities, and thereby reduce her and the petitioners to indigence, a case was laid before eminent Counsel, on behalf of the petitioners, who gave directions that if a deed was executed by the petitioners' father and mother, conveying to new trustees their several and respective estates for life, in said houses, lands and premises, the same would be preserved for the benefit of the petitioners. This allegation is denied by the answering affidavit. The case and opinion would have been important to show the *bona fides* of the proceedings. It has not been produced by the petitioners. There are provisions in the deed of the 18th of January 1850, calculated to show that this instrument, as alleged by the respondent, was executed to cover the property from the creditors of the father and mother of the petitioners; and I pay very little attention to the statements made as to the case and opinion. If that opinion was handed over to the respondent, with any other documents, interrogatories might have been exhibited on the subject. On the evidence before the Court, I cannot assume that it was. If it be lost, the solicitor who prepared the same might (if its loss had been put in issue and sworn to) have proved its contents. The petition states that, in pursuance of said arrangement (*i. e.*, the advice of Counsel), a settlement bearing date the 16th of January 1850 was executed, by and between the petitioners' father and mother, of the first part, John Orpen, who was the surviving trustee in the settlement of 1831, of the second part, and William Joyce and J. G. Douglas, of the third



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part. That deed (which is not correctly stated in the petition), after reciting the title to the lands and premises, and the marriage settlement of 1831, and the names of the children of the marriage, recites as follows :—" And whereas the said Eliza Mary Joyce, in order to further the prospects in life of her before-named children, and also in consideration of the sum of 10s., has consented and agreed to assign and make over her life estate in the lands and premises in the before-recited indenture of settlement, to trustees, for the benefit of her children ; and the said Thomas Joyce, for the like purpose, and also in consideration of 10s., hath also agreed to assign his reversion in the lands, tenements and premises in the before-recited indenture of settlement, in case he should survive the said Eliza Mary Joyce, his wife, to trustees, for the like purpose, and has consented to be an executing party to these presents." And after such recitals, the indenture witnessed that Eliza Mary Joyce, "for the consideration herein mentioned," and in consideration of 10s. paid to her by the trustees William Joyce and J. S. Douglas, conveyed her life interest in the said houses, lands and premises (with the consent of her husband Thomas Joyce) to the said trustees, on the trusts therein mentioned. The petition erroneously states that Thomas Joyce conveyed. This is not the case ; he only covenanted to convey, as I shall just now state ; and it is strange that there should have been a misrepresentation of the deed, in so important a particular, in the petition. The trusts are then declared, that the trustees "shall have, receive and take the rents, issues and profits of the herein-mentioned premises, during the life of the said Eliza Mary Joyce and Thomas Joyce respectively, and apply the proceeds thereof, after payment of head-rent and renewal fines payable out of same, to the use and benefit and for the maintenance, clothing, education and preferment in life of the before-mentioned children, issue of the marriage, lawfully begotten on the body of the said Eliza Mary Joyce, and to be paid and payable at such time and times, and in such manner, shares and proportions as they the said William Joyce and James Gardiner Douglas (the trustees), their executors, &c., may deem sufficient for the furtherance and benefit of the before-

mentioned children of said Eliza Mary Joyce and Thomas Joyce respectively." And it was by said deed further agreed that the said trustees should have full power and control over the said houses, lands and premises during the lifetime of Eliza Mary Joyce and Thomas Joyce, "free from the control or intermeddling, debts or engagements, securities or incumbrances, which at any time may have affected the estate of Eliza Mary Joyce or Thomas Joyce, their executors," &c. This provision looks like a plan to defeat the creditors of Thomas Joyce and Eliza Mary Joyce. A leasing power is then given to the trustees, to demise, with or without fine, provided that, if fines were taken, they should be invested in the funds, and the dividends applied on the trusts of the settlement.

Then follows a covenant by Thomas Joyce, for himself, his heirs, &c., with the trustees, that, if he should survive his wife, he would, *if called on by the trustees*, assign his estate and interest in the said houses, lands and premises to the said trustees, on the trusts hereinbefore mentioned. Then follows a power to appoint new trustees, framed in such a manner as to enable the said Eliza Mary Joyce and her husband to remove the trustees without any cause, and appoint other trustees; and indeed the frame of the deed is such that it was, probably, a mode adopted of protecting the property from the creditors of Thomas Joyce and his wife; and I have little doubt that, if the case and opinion laid before Counsel had been proved, this would have appeared. The petition states that William Joyce, one of the trustees (who was the brother of Thomas Joyce), misapplied the rents, and that the other trustee, Douglas, entered into the receipt thereof, having served notices on the said William Joyce, the last of which bore date the 10th of August 1850; and afterwards the petitioners' father, having intermeddled in the receipt of the rents, Douglas gave up receiving the same. This is denied by John Hutton's answering affidavit, who says that the agent of Thomas Joyce and his wife continued to receive the rents after the execution of the deed of 1850. The premises being under ejectment for non-payment of rent, and the *habere* executed, the respondent John Hutton advanced to the landlord £203. 8s. 8d., and paid to

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*Judgment.*

1860.  
*Rolls.*  
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 ———  
*Judgment.*

Thomas Joyce £30; and the respondent John Hutton alleges that he has expended large sums in keeping down head-rent, and in repairs, and that he is out of pocket, after all sums received by him, £214. 17s. The schedule to the answering affidavit shows how this sum is made out. The petition then alleges that the respondent John Hutton received a sum of £500 on a policy of insurance, which he effected on the life of petitioners' mother, as collateral security with the deed hereinafter mentioned, of the 18th of December 1850, and that he undertook that the petitioners should have the benefit of such insurance: that allegation, however, has not been proved, and is wholly denied by John Hutton. The petition states the indenture of the 18th of December 1850, made between the petitioners' father and mother, of the first part, the said Joyce, of the second part, and the respondent John Hutton, of the third part; whereby the said parties of the first and second parts, for the alleged consideration of £20, of which the petition states only £15 was paid, conveyed the said houses in Dublin to the said John Hutton and his heirs, for the unexpired term for which same were held; which deed was registered on the 12th of July 1851. The petition then states certain articles of agreement, made between petitioners' father and the said John Hutton, and which bear date the 3rd of December 1853, whereby it was agreed, to prevent further litigation, that the rents of the said houses should be divided between them, share and share alike, the said respondent John Hutton retaining a certain sum for head-rent, repairs and taxes, and collection of the rents; and it was further agreed that, upon the said John Hutton receiving £150, he would deliver up possession to the petitioners' father. The petition then alleges that the respondent received the £150, by perception of the rents, he not having paid the petitioners' father the moiety of the rents, but only a small weekly sum.

The petitioners' mother died on the 1st of May 1852. An affidavit has been made, in reply, by the petitioner Sophia Joyce, and an affidavit by way of rejoinder by the respondent John Hutton, and there are conflicting statements as to some of the facts; but I do not consider it necessary to state them, as, on the

legal ground I shall just now state, I consider that the petition is not sustainable. The petitioners have no present rights under the marriage settlement of the 5th of April 1831, as the trusts in their favour were, under said settlement, to take effect only after the death of their father and mother; and their father is still living, and was entitled to a life estate under said settlement. With respect to the post-nuptial settlement, of the 16th of January 1850, under which the petitioners can alone claim, the life estate of the petitioners' mother, conveyed thereby, has determined by her death; and the petitioners' father did not thereby convey his life estate, as erroneously stated in the petition, but he covenanted with the trustees that, if he should survive his wife, he would, if called on by the trustees, assign to them his estate and interest in the houses, on the trusts of the settlement.

The right of the petitioners to maintain this suit depends, therefore, on their right to enforce the specific performance of that covenant against the respondent John Hutton, and the right to enforce such performance must depend on two questions; first, whether the post-nuptial settlement of 1850 was a voluntary deed? as, if it was, this suit cannot be sustained; and secondly, whether, if the said settlement was, as between the father and mother of the petitioners and the trustees, a deed for valuable consideration, the petitioners, who were not within the consideration, and were no parties to the contract, can enforce the performance of the covenant? A merely meritorious consideration, as a provision for a wife or children after marriage, will not be a sufficient inducement for a Court of Equity to lend its aid in enforcing a voluntary agreement or covenant: *Jeffrys v. Jeffrys* (a); *Dillon v. Coppin* (b).

The question, therefore, arises, whether the post-nuptial settlement of 1850, as far as the petitioners have a claim thereunder, was a deed for valuable consideration? A conveyance by husband and wife, of the estate of the wife, is, as between the husband and wife, a deed for valuable consideration, the property

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*Judgment.*

(a) Cr. & Phil. 126.

(b) 4 M. & C. 647.

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passing out of both husband and wife, and neither being able to convey without the concurrence of the other. *Musherry v. Chinnery* (a), *Scott v. Bell* (b), *Hewson v. Myers* (c), and other cases, establish that. This case, however, differs in this respect; that here the wife was, under the settlement of April 1831, seised for her separate use for life, with remainder to her husband for life; and the wife, by the post-nuptial settlement of 1850, conveyed her life estate and her husband covenanted to convey his life estate to her trustees, if he survived his wife, and if called on by the trustees. Now, whether the wife conveying her separate estate, and the husband covenanting to convey his reversionary estate for life, constituted a valuable consideration between the husband and wife, there being no statement on the face of the deed that the conveyance by the wife was in consideration of the covenant by the husband, it is, in my opinion, unnecessary to decide, as the petitioners were not parties to the post-nuptial settlement, nor within the said consideration, assuming that there was a valuable consideration as between the husband and the wife.

I have already referred to the cases which establish that a mere meritorious consideration, such as a provision for children after marriage, will not authorise a Court of Equity to lend its aid to enforce a voluntary agreement or covenant. It is also established by authority that, as a general rule, where two persons, for valuable consideration, as between themselves, covenant to do an act for the benefit of a third person, that third person cannot enforce the covenant against the two, although either of the two might, as against the other: *Collyear v. Mulgrave* (d); *Hill v. Gorman* (e); *Davenport v. Bishop* (f). No doubt, as stated by Lord Cottenham in *Hill v. Gomme*, "in all marriage contracts (*i. e.*, in contracts in consideration of marriage), the children of the marriage are not only objects of it, but *quasi* parties to it." But I apprehend that observation is not applicable to post-

(a) L. & G., *temp. Sug.*, 222.

(b) 2 Lev. 70.

(c) 16 Beav. 594.

(d) 2 Keen, 81.

(e) 1 Beav. 540; S. C., 5 Myl. & Cr. 250.

(f) 1 Y. & C., C. C., 451; S. C., 1 Phil. 696.

nuptial deeds or contracts. There is no marriage consideration in such case; and I do not understand on what ground the petitioners, as children of the marriage, and who are not within the consideration (if any) of the post-nuptial settlement, and who are not parties to the contract, can enforce it.

It is not necessary to offer an opinion on a point relied on by the respondent John Hutton, that the deed of January 1860 was a deed executed by the father and mother to defeat their creditors, and was not *bona fide*. The provisions of the deed afford some colour for the objection, as also the non-production of the case laid before Counsel, or his opinion. I think it was imprudent of the petitioners to reject the offer made by Mr. *Sherlock*, on the part of the respondent John Hutton, to take £100 if the costs were paid, and to re-convey to the petitioners. Mr. *Sherlock* stated, and I presume from the circumstances of the case, correctly, that the petitioners would be unable to pay the costs to be incurred upon a reference; and he therefore relied on the legal objections I have adverted to, in the event of the offer not being accepted. I am of opinion, on the whole, that the petitioners have no right to maintain the suit against the respondent John Hutton, unless they could enforce the covenant of their father, contained in the post-nuptial settlement; and I think that, assuming there was a valuable consideration between the husband and wife and the trustees in that settlement, which may admit of much doubt, that the petitioners were not within the consideration, and were no parties to the contract, and cannot enforce it. The petition, therefore, will be dismissed.

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*Rolls.*  
JOYCE  
v.  
HUTTON.  

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Judgment.

1860.  
L. E. Court.

### Landed Estates Court.

In the Matter of the Estate of  
Sir JOHN NUGENT HUMBLE, *Owner and Petitioner*,  
Devises of J. T. FITZGERALD.

Jan. 15.

A enters into an agreement, to the following effect:—

“That he should execute a mortgage, payable with interest at £5 per cent., in four years, to B and C, to secure to them an amount awarded, viz., £3120, with interest at £5 per cent. on the principal sum of £2800, late currency, from the 27th of April 1842, the date of the award, A giving reasonable proof that he has power to grant such mortgage, and that the property to be mortgaged is adequate security for it.—*Held*, that such an agreement (though not sufficient to ground a decree for immediate specific performance) would authorise the Court of Chancery to order A to select a sufficient portion of his estates, and make it a security in compliance with the agreement.

THE facts of this case, which seems to be a case of first impression, appear fully from the judgment. The case came on for argument on objection to the final schedule.

Mr. J. E. Walsh, for the objection, cited *Crofts v. Feuge* (a); *Fremoult v. Dedire* (b); *Peachey on Settlements*, p. 550; *Williams v. Lucas* (c); *Lechmere v. Earl of Carlisle* (d); *Gardiner v. Townsend* (e).

Mr. Thomas Harris, and Messrs. Owen F. Smith and Shskelton, with him, *contra*, cited *Roundell v. Breary* (f); *Creed v. Carey* (g); *Watson v. Sadleir* (h); *Coventry v. Coventry* (i).

*Held also*, that, after the lapse of four years and A's death, it could not be specifically enforced against the heirs and devisees of A, but would enable B and C to institute an administration suit, and claim that a sufficient portion of A's real estate be applied in payment of the debt.

*Held also*, that this being so, it was (after a sale in the Landed Estates Court) to be regarded as a specific charge, taking priority of general creditors, but *puisne* to other specific charges.

(a) 4 Ir. Ch. Rep. 316.

(c) 2 Cox, Ch., 160.

(e) Coop., C. R., 301.

(g) 7 Ir. Ch. Rep. 296.

(b) 1 P. Wms. 429.

(d) 3 P. Wms. 211.

(f) 2 Vern. 481.

(h) 1 Moll. 585.

(i) 2 P. Wms. 222.

HARGREAVE, J.

The facts of this case are as follows:—The lands sold in this matter were the property of Thomas Joseph Fitzgerald, who is now deceased; and they were derived by him, in part at least, from his grandfather, Thomas Fitzgerald. In and prior to the year 1841, disputes were pending between him and two gentlemen of the name of Quin and Hearn, and their wives, as to his liability to a considerable sum of money, in consequence of an alleged breach of trust, committed by his grandfather, Thomas Fitzgerald; and by a deed of the 16th of November 1841, all matters in dispute were referred to the arbitration of the late Judge Moore and Judge Keatings, then practising at the Bar. I am not informed whether these gentlemen made any final award, but it sufficiently appears that they had decided that Mr. Fitzgerald should pay to Mr. Quin and his wife, and Mr. Hearn and his wife, in equal moieties, £2600, late currency, with six years' interest, at £5 per cent., in all £3120 sterling. Nothing further appears to have been done until the 29th of May 1850, when a meeting was held between the parties and their solicitor, the result of which was embodied in a written memorandum of agreement, signed by Mr. Fitzgerald and his solicitor, by Mr. Quin and the solicitor of Mr. Quin, and Mr. Hearn; and the question which I have to determine is, whether this agreement is capable of being enforced specifically against the real estate of Thomas Joseph Fitzgerald, or its produce now in Court? It is admitted that the agreement can have no effect against mortgagees of any part of Mr. Fitzgerald's real estate, or against parties having specific charges thereon; and effect is sought to be given to it only as against the heir and devisees of Mr. Fitzgerald and his general creditors. The substance of the agreement may be stated thus:—  
“It was agreed that Mr. Fitzgerald should execute a mortgage, payable with interest at £5 per cent., in four years, to Dr. Quin and Mr. Hearn, to secure to them the amount awarded, viz., £3120, with interest at £5 per cent. on the principal sum of £2600, late currency, from the 27th day of April 1842, the date of such award, Mr. Fitzgerald giving reasonable proof that he has power to grant

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L. B. Court.  
In re  
HUMBLE.  
Judgment.



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*L. E. Court.*  
*In re*  
 HUMBLE.  
 —  
*Judgment.*

such mortgage, and that the property to be mortgaged is adequate security for it."

Numerous cases were cited, beginning with *Freemoult v. Dedire* (a), principally upon covenants to settle or to charge jointures, in some of which they have been held to be specific liens, and, in others, the contrary, according to circumstances. These cases generally have reference to after-acquired estates; and where there is a covenant to settle such estates, of a particular value, the rule would appear to be that such a covenant does not specifically affect property purchased, unless there be evidence to show that the purchase was made with a view to its performance. I intimated, during the argument, that I was disposed to place a construction upon this agreement which would render that class of cases only remotely, if at all, applicable. It appeared, and still appears to me, that the agreement must be read in one of two ways; it is either a mere general promise by a debtor to his creditor, that he will give security for the debt to be paid at the end of four years, or it is a specific agreement, for sufficient consideration, that he will mortgage a sufficient portion of his real property to secure the debt, and show a good title to it. The former would be vague, and, in the eye of a Court of Equity, unmeaning and incapable of enforcement. The latter would, I think, be a contract sufficiently definite for the Court of Chancery to enforce, if the debtor should neglect to tender, within a reasonable time, a sufficient mortgage, with proper proof of title.

After full consideration, I am disposed to think that the latter is the fair construction of this agreement. The term "mortgage" implies ordinarily a security on real estate; and a covenant to make a mortgage would not be satisfied by a mortgage of a ship or of personal estate, any more than trustees authorised to lend money on mortgage would be justified in lending it on a mortgage of goods. I think also that this agreement imports a mortgage by Mr. Fitzgerald of a sufficient portion of his then existing real estate, as it is evident that the agreement was intended to be carried into execution immediately; that is, within a reasonable time, and not upon

(a) 1 P. Wms. 429.

any future contingency, such as his purchasing other estates. This view distinguishes this case from the authorities cited. Now, taking this as the meaning of the agreement, I do not see any ground for doubting that a contract between a debtor and his creditor, that the former will make a mortgage of all his real estate, or of a specific portion of his real estate, to secure payment of the debt with interest at a future day, is a contract which would be enforced by a Court of Equity. The case of *Crofts v. Feuge* (a) was relied on against this proposition; but that case was decided upon the ground that the creditor had already, by means of a judgment, substantially got all that the Court could give him; and also on the ground that there was no consideration for the agreement; and the Court was influenced by the apparent hardship of subjecting the debtor to a suit to compel him to make a mortgage, contemporaneously with another proceeding, to sell the estate on foot of the collateral judgment. In the present case, however, there is a sufficient consideration in giving time for four years; and, during the period of delay, in such a case as I have put, I do not see any obstacle in the way of enforcing specific performance. Is the case then altered, when the agreement is not to mortgage all the debtor's estate, or a defined portion of it, but to mortgage a sufficient portion, to be selected by the debtor, and proved to be sufficient? It is not difficult to suggest practical impediments which would occur in the course of a suit to obtain performance of such an agreement; but I do not see any objection in principle to a decree requiring the debtor to select a sufficient portion, and, in default of his doing so, that the Master should make the selection. I am bound, however, to say that, after the end of the four years, and the death of the debtor, I do not think that a suit could be sustained against his heir or devisee, to compel him to make the mortgage. Such a course would be open to the objection of its being a suit to obtain security, with a view to the security being immediately enforced. The proper course, I think, would be to proceed by way of administration of the estate, and in the course of such a suit to claim that a sufficient portion of the produce of the real estate

1860.  
L. E. Court.  
In re  
HUMBLE.  
Judgment.

(a) 4 Ir. Chan. Rep. 316.

1860.  
*L. E. Court.*  
*In re*  
 HUMPHREY.  
 —  
*Judgment.*

should be applied to pay the debt. That is what the creditors are now seeking to do; and, on the whole, I am of opinion that, as against the devisees of Thomas J. Fitzgerald, they are entitled to this relief; and, as the general creditors can only attach the property which beneficially comes to the heir or devisee, I think that they are equally bound. The Statute of Limitations does not apply, as the consolidated sum to be secured by the mortgage would not be payable until May 1854, which was within six years of the filing of the petition in this Court. Indeed the petition was filed within two or three years after the date of the agreement of 1850, and before the lapse of the four years' delay.

I have had some doubt whether Dr. Quin, by taking a bond and warrant of Thomas J. Fitzgerald, did not waive his right under the agreement. It is not, however, unreasonable to assume that the bond and warrant were given by the debtor with a view to the judgment being made a charge on his real estate; and, as this has failed, I think Dr. Quin is entitled to fall back on the agreement.

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In the Matter of the Estate of

GEORGE POWELL HOUGHTON, *Owner and Petitioner.*

Nov. 15.

A lease for 500 years, dated 14th December 1669, contained a covenant by the lessee, his executors, administrators and assigns, with the landlord, his executors, administrators and assigns, not to sell before the first proffer be made to the landlord, his executors, administrators and assigns, to the end that they might have the first refusal thereof, and pay as much as any other person should *bona fide* offer.—*Held*, that is a covenant that runs with the land, but that it is not a perpetual one; and, therefore, an assignment of the tenant's interest having been made 140 years ago, it must be presumed that the landlord declined the offer or waived his right, and the tenant must now hold discharged from the said covenant.

THE petition in this case was presented by George Powell Houghton, owner and petitioner, for the sale of certain of his property in the county of Wexford, including (amongst others) the lands of Kilmanogue, held under an indenture of lease, dated the 14th of December 1669, and made between Robert Leigh, of the one part,

the landlord, his executors, administrators and assigns, not to sell before the first proffer be made to the landlord, his executors, administrators and assigns, to the end that they might have the first refusal thereof, and pay as much as any other person should *bona fide* offer.—*Held*, that is a covenant that runs with the land, but that it is not a perpetual one; and, therefore, an assignment of the tenant's interest having been made 140 years ago, it must be presumed that the landlord declined the offer or waived his right, and the tenant must now hold discharged from the said covenant.

and Patrick Lambert, of the other part, for the term of 500 years, at the yearly rent of 40s. The lease, in addition to the usual covenants, contained one in the following words:—"And likewise the said Patrick Lambert, his executors, administrators and assigns, doth covenant, promise, grant to and with the said Robert Leigh, his executors, administrators and assigns, that neither the said Patrick Lambert, nor his executors, administrators and assigns, shall or will assign over or sell their whole interest, or any part of their interest, in the before demised premises, to any person or persons whatsoever, before the first proffer thereof be made unto the said Robert Leigh, his executors, administrators or assigns (if they, or any of them, be at Rosegarland or near Kilmanohé at the time of such sale), to the end that they may have the first refusal thereof, and pay as much for the same as any other person or persons shall *bona fide* offer for the same."

1860.  
*L. E. Court.*  
*In re*  
HOUGHTON.  
*Statement.*

The lessee's interest in the land comprised in the said lease subsequently became vested in the said George Powell Houghton, and the lessor's interest in Francis A. Leigh. It appeared, during the course of the case, that an assignment of the lessee's interest had been executed to a purchaser for value, about 140 years ago, and that rent had always since that time been received by the persons representing the lessors, from the persons deriving title under the said assignment.

Mr. *J. E. Walsh* (with him Mr. *R. Owen*) moved, on behalf of the said F. A. Leigh, that the rental in the said matter might be amended, by placing the lands and hereditaments comprised in the said indenture of lease in a separate lot, and not jointly with any other lands, in order that the said F. A. Leigh might have the right of pre-emption reserved to him by the said indenture. The covenant in the lease is not repugnant: *Weatherall v. Geering* (a). If the covenant runs with land, the heir taking the reversion may sue upon covenants, though not expressly entered into with the lessor and his heirs: *Sacheverell v. Froggart* (b); 2 *Platt on Leases*,

*Argument.*

(a) 12 Ves. jun. 504.  
VOL. 11.

(b) 2 Saund. 367.

1860.  
L. E. Court.  
In re  
HOUGHTON.  
Argument.

p. 362; *Doe d. Bamford v. Hayley* (a); and assignee of reversion has the same right: 10 *Car.* 1, sess. 2, c. 4 (*Ir.*); 32 *H.* 8, c. 34 (*Eng.*); 1 *Furl.*, p. 509. This covenant runs with the land: 2 *Platt on Leases*, p. 400; *Sug. V. and P.*, p. 485.

Mr. *J. Rogers*, for George Powell Houghton, referred to *Smythe's Landlord and Tenant*, pp. 294, 286. The right of pre-emption in this case, from the very language of the covenant, is confined to the first sale only; and it must now be presumed that, on the occasion of the assignment of the lessee's interest, so long ago, the lessor refused the land, and therefore the right does not now exist. He referred also to *Stecker v. Dean* (b); *Keppel v. Bailey* (c); *Duke of Bedford v. Trustees of British Museum* (d); *Sparrow v. Cooper* (e).

Mr. *R. Owen*, in reply.

*Sparrow v. Cooper* is not now law: see *Sugden on Vendors and Purchasers, App.*, p. 651; *Whatman v. Gibson* (f); *Mann v. Stephens* (g); *Tulk v. Moahay* (h).

HARGREAVE, J.

Nov. 17.  
Judgment.

This is an application on the part of Mr. Leigh, of Rosegarland, to have the rental amended by placing in a separate lot that portion of the Kilmannoek property which is held by the owner under a lease of the 10th of December 1669, in order that, when the sale has taken place, Mr. Leigh may exercise an alleged right of pre-emption, and take the lease at the same price as is offered for it at the sale. I am of opinion that, if the right of pre-emption exists, there is necessarily incident to it a right to have the lease sold by itself, and not in conjunction with other property in which Mr. Leigh has no interest, and no corresponding right of pre-emption. The question turns on the effect of a clause in the lease of 1669, which is in the form of a covenant by the lessee Patrick Lambert, that neither he

(a) 12 East, 464.

(c) 2 M. & K. 517.

(e) H. & J. 404.

(g) 15 Sim. 377.

(b) 16 Beav. 161.

(d) 2 M. & K. 552.

(f) 9 Sim. 126.

(h) 2 Ph. 775.

nor his executors, administrators or assigns, would assign over or sell their whole interest, or any part of it, in the demised premises, before the first proffer be made to Robert Leigh, his executors, administrators or assigns (if they or he be at Rosegarland at the time), to the end that he or they may have the first refusal thereof, and pay as much for the same as any other person should *bona fide* offer. After the best consideration that I can give the matter, I see no reason to doubt that, regarded as a legal covenant, it is one which will run with the land, so that the benefit of it will belong for the time being to the owner of the reversion, and that the burden of it will fall upon the owner for the time being of the lease. Where I find a covenant relating to the thing demised, which cannot possibly be performed, except by the lessee or the assignee for the time being of the lease, and to the beneficial profit of which no title can be made, except by the owner of the reversion, it seems to me that to hold that such a covenant does not run with the land has the effect of destroying it altogether. But whatever doubt may exist on this technical point, there cannot be much doubt that the contract is one which a Court of Equity would enforce against a purchaser with notice; and in such a case as this every purchaser is necessarily a purchaser with notice. Let us suppose for a moment that a lease contains a clause that the landlord may at any time determine it, on payment of a certain sum of money; can there be any doubt that such a clause is valid, and capable of being enforced at Law if it be in the nature of a condition, and Equity if it be in the form of a covenant or contract? The present covenant is more limited, for it restricts the landlord's power of determining the lease to certain events, over which the lessee has the principal control. If I am right in this view, the only question is as to the construction of the covenant. Is it a general and perpetual covenant that whenever the owner of the lease wishes to part with it for money, he must give the landlord the pre-emption, although he himself was a purchaser for money? or is it simply a contract by the lessee that, whenever he or his representatives or family shall sell the lease, they shall give the first offer to the landlord? I may observe that the latter is a much more probable species of contract than the

1860.  
L. E. Court.  
*In re*  
HOUGHTON.  
Judgment.

1860.  
L. E. Court.  
*In re*  
HOUGHTON.  

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Judgment.

former; in fact it is a natural contract to enter into, whenever a vendor (which in this case Mr. Leigh substantially was) sells to a person as a kind of favour. Such a contract points to a personal wish on the part of the landlord or vendor to have the property back at its fair value, whenever the lessee or purchaser ceases, by himself or his family, to have the personal enjoyment of it. I should not have entertained any doubt at all that this was the view of the parties in this case, if it were not for the introduction of the word "assigns" into the covenant; in all other respects I should have considered the language of the covenant as conclusive that the parties were merely contemplating the event of the property passing from Lambert and his representatives to a purchaser. There are no words indicating a plurality or succession of sales; nothing pointing to a permanent right, *toties quoties*, whenever the property should be sold. I do not think that this very extensive and inconvenient construction of the covenant should be adopted, merely from the use of the word "assigns," particularly as a meaning can be given capable of satisfying that word, without giving so high a degree of importance to it. The word "assigns" may very well apply to the case of parties claiming as legatees or volunteers under the lessee, or persons claiming under a marriage settlement, or any form of assignment, except that of an assignment upon the sale for money. On the whole, I think that a purchaser of this lease for money, the landlord having had the offer of standing in his place, and having declined it, holds the lease free from this onerous condition. Applying these principles to the present case, I find that the lease was sold by Lambert's son (I believe) in 1720, to a purchaser for money value, under whom Mr. Houghton derives. I must, of course, now assume either that the landlord then declined the offer, or waived his right, as there has been a possession for 140 years, without any attempt to enforce a title on the part of the landlord.

1860.  
*L. E. Court.*

In the Matter of the Estate of  
**WILLIAM HUMPHREY RATHBORNE, ROBERT  
ST. GEORGE RATHBORNE, GEORGE LOWTHER  
RATHBORNE, RICHARD COFFEY and PENELOPE  
COFFEY, his wife, Owners and Petitioners.**

Nov. 27.

**WILLIAM RATHBORNE**, late of Scribblestown, in the county of Dublin, father of the several owners and petitioners (except Richard Coffey, the husband of his daughter the said Penelope Coffey), made his will, dated the 19th day of December 1855, and which, after the confirmation of certain settlements and appointments, and the execution of certain powers, contained the following residuary gift:—"And as to all the rest, residue and remainder of my property, real and personal, of every nature, kind or description, whereof I may die seised or possessed, my will is that the same be sold by my executors hereinafter named; and the produce thereof (subject to the payment of my debts, and funeral and testamentary expenses) I give, devise and bequeath the same to my sons Robert St. George Rathborne, St. George Rathborne, Gorges Lowther Rathborne, and my daughter Penelope Coffey, share and share alike, as I consider my eldest son William is sufficiently provided for."

A lapsed share of a residue of real and personal estate, devised, subject to the payment of debts, funeral and testamentary expenses, is not liable to the debts of the testator, in exoneration of the rest of the residuary estate, but rateably with it.

*Statement.*

The said testator died in the month of September 1857, without revoking or altering his said will, and left all the said residuary devisees him surviving, with the exception of the said St. George Rathborne, who died in the lifetime of his father, the said testator.

Some time after the death of the said testator, the petition was presented for a sale of the property comprised in the said will, and the name of the said William Humphrey Rathborne was used as one of the owners, but without his consent; but he was aware of the proceedings, and offered no opposition thereto. The property of the testator consisted of estates of different tenures; some in



1860.  
*L. E. Court.*  
*In re*  
**RATHBORNE**  
*Statement.*

fee-simple, some held under leases for lives renewable for ever, and some under chattel leases. The said William Humphrey Rathborne, one of the owners, was the eldest son and heir-at-law of the said testator, and, on his father's death, became entitled to the share of the said St. George Rathborne, so far as it consisted of realty. The question arose on the allocation of the surplus funds, after the payment of all the incumbrances; the residuary devisees contending that the lapsed share of St. George Rathborne was liable to the payment of debts and incumbrances, in exoneration of the shares of the other residuary devisees.

Mr. *J. E. Walsh* (Mr. *Richards* with him), for the residuary devisees.

*Argument.*

In the application of assets in the payment of debts and legacies, estates which descend to the heir, whether acquired before or after the making of the will, are liable to the payment of debts and legacies, in exoneration of real and personal property, devised or bequeathed charged with debts. See 2 *Jarman on Wills*, p. 327, and the cases therein referred to.

Mr. *Robert Owen*, for the heir-at-law.

The cases cited on the other side do not apply; for the rule laid down in those cases is based on the principle that the intention of the testator should not be disappointed: *Chaplin v. Chaplin* (a); *Golton v. Handcock* (b). The testator's intention will not be frustrated if the lapsed share bears debts equally with the rest of the residue. This is not a case of one estate devised, and another descended; it is, in fact, a devise of one estate for payment of debts, and another, viz., the residue, to four persons, and out of which residue there is a lapse. The rule as to real estate descended does not apply to the case of a lapsed devise: *Bennett v. Bachelor* (c). It is decided that a lapsed share of real estate, devised subject to payment of debts, is applicable for payment of debts, in the same order as the

(a) 3 P. Wms. 368, *note*.

(b) 2 Atk. 424..

(c) 1 Ves. jun. 67.

devised estates: *Wood v. Ordish* (a); see also *Fisher v. Fisher* (b); *Parker v. Marchant* (c); *Williams v. Chitty* (d).

1860.  
L. E. Court.  
In re  
RATHBORNE

Dec. 15.  
Judgment.

HARGREAVE, J.

William Rathborne, the testator in this matter, by his will, made in 1855, directed that all his property, real and personal, whereof he might die seised or possessed, should be sold by his executors; and the produce thereof (subject to the payment of his debts, and funeral and testamentary expenses) he devised and bequeathed to his sons Robert Rathborne, St. George Rathborne, Gorges Lowther Rathborne, and his daughter Penelope, share and share alike, stating that he considered his eldest son William sufficiently provided for. One of the four legatees died in the testator's lifetime, so that his one-fourth, as to the real estate, descended in Equity to his heir, William Rathborne, and as to the personal estate, devolved upon his next-of-kin. The question which is now raised is, whether this fourth is liable to the debts of the testator, in exoneration of the other shares of the residuary estate, or merely rateably with them? I entertain no doubt, either upon principle or upon authority, that the proper mode of administration is to pay the debts out of the general residuary fund, and that the balance is to be divided into four shares, and that one of these fourths, thus ascertained, is to go, as I have stated, to the heir and next-of-kin. By this distribution, each of the three surviving residuary legatees obtains precisely what the testator gave to him, and he is not placed in any worse or in any better position than he would have been in if there had been no lapse. The rule of Equity appears to be that, where there is a devise or bequest of any particular real or personal property, the property which is not disposed of and descends to the heir must indemnify the devised property from debts; for the simple reason that, if any of the debts is cast upon the devised estate, there is a frustration to that extent of the testator's dis-

(a) 3 Sim. & Giff. 125; S. C., 1 Jur. (Eng.), N. S., 584.

(b) 2 Keen, 610.

(c) 1 Y. & C., C. C., 305.

(d) 3 Ves. 545.

1860.  
*L. E. Court.*  
*In re*  
 RATHBORNE

—  
*Judgment.*

position. The testator, in making a devise, is considered to have intended such a marshalling of his various assets as will best effectuate his expressed intention of devising the estate to his devisee, which means devising the whole estate free from liabilities. But, from the nature of the case, this doctrine can have no application to devisees of a fund, which fund is defined as being the general residue of his estate, subject to the payment of his debts, and funeral and testamentary expenses. The Court cannot collect any intention that any particular estate or any particular amount should go to the devisees; and, therefore, any marshalling of assets cannot be said in any way to contribute to carry into effect any supposed intention of the testator. I apprehend, therefore, that there is no principle of Equity which would warrant the view of the devisees, or place them in a better position than they would have been in if no lapse had taken place; and I mention this because it was suggested by Mr. *Walsh* that the rule of marshalling against the heir, in favour of the devisee, was a merely arbitrary rule, and was to be carried into effect in all cases, independently of any other reason for doing so, except that it is the rule. The case of *Williams v. Chitty* decided that an heir taking by lapse was in no better position than the heir taking after-acquired estate, or taking what was never intended to be devised; and this seems to me to be a natural consequence of the rule. The Court, in fact, will lay hold of all property which is not disposed of in fact (whether it is intended to be or not), so as, if possible, to give the devisee what the testator meant for him, viz., the estate in its integrity. I cannot, however, reconcile this case with *Wood v. Ordish (a)*. In that case there were after-acquired estates and a lapsed devise, both of which the heir took. The former were not sufficient to pay the debts; and then the question arose whether the latter should bear the debts in exoneration of the estates which were effectually devised, and the Court decided in the negative. The case was peculiar, inasmuch as the lapse was of an undivided share of a remainder expectant on a life estate created by the will; and the Court considered that, as the life

(a) 3 S. & G. 125.

estate was protected, the remainder in the whole ought to be considered as standing in the same equity, notwithstanding that the devise of two shares took effect and the third failed. I do not think, for the reasons I have mentioned, that either of these cases governs the present. This case more resembles *Fisher v. Fisher* (a). They are, in fact, identical, except that the general residuary estate was made a primary fund to pay the debt, so as to exonerate the personalty. But that circumstance was immaterial, as the question was not between the realty and the personalty, but between different shares of the realty, as to one of which there has been a lapse; and the Court held that all the shares were in the same position, as the testator merely intended each share to be a share of the surplus after paying debts. In this case, therefore, the debts must be distributed rateably over the real and chattel property, and one-fourth of the residue of the real must go to the heir, and one-fourth of the residue of the chattels to the next-of-kin.

1860.  
*L. E. Court.*  
*In re*  
*RATHBORNE*  
*Judgment.*

(a) 2 Keen, 610.

In the Matter of the Estate of

ROBERT WILLIAM JACKSON, *Owner and Petitioner.*

1861.  
Jan 15.

MR. J. H. RICHARDS moved, on behalf of Sir Capel Molyneux, that there should be inserted in the conversion order of a lease for lives renewable for ever, ordered to be sold in this matter, and the lessor's interest in which was vested in the said Sir C. Molyneux, and the lessee's interest in the said R. W. Jackson, a covenant giving to the landlord the right of pre-emption, or, in case of the omission of the said covenant, that compensation should be given to the said Sir C. Molyneux, by way of increased rent.

In the conversion of a lease for lives renewable for ever, the Landed Estates Court will make no substantial increase in the rent, by reason of the commutation of the covenant giving the landlord the right of pre-emption.

The lease in question was dated the 6th of February 1764, and

1861.  
*L. E. Court.*  
*In re*  
**JACKSON.**  
*Statement.*

was made between Robert Sibthorpe, of the one part, and John Watson, of the other part, for three lives, with a covenant for perpetual renewal thereof, and comprised part of the lands of Teemore, in the county of Armagh, at the yearly rent of £41. 9s., with a renewal fine of £6. 6s. on the fall of each life. The said lease contained a covenant on the part of the said John Watson, in the following words:—"And the said John Watson, for himself, his heirs and assigns, doth further covenant, promise and grant, to and with the said Robert Sibthorpe, his heirs and assigns, by these presents, that the said John Watson, his heirs and assigns, shall not sell or depart with his or their estate therein unto any person or persons whatsoever, without the consent of the said Robert Sibthorpe, his heirs or assigns, until he or they have had a first refusal thereof."

By deed poll, dated the 8th of June 1789, the said John Watson, in consideration of £400, granted to Robert W. Jackson, the father of the owner and petitioner, his heirs and assigns, the said part of the lands of Teemore so demised by the lease of 1764.

The last renewal was dated the 17th of March 1820, and was made by Thomas Molyneux, grandfather of the said Sir C. Molyneux, to the said R. W. Jackson. This renewal was not produced in Court; and it did not, therefore, appear whether the above-mentioned covenant was expressly inserted therein, or whether the renewal was made subject to the subsisting covenants in the original indenture of lease. Mr. *Richards* did not press for the insertion of the covenant, but only for an increase of rent, and referred to the 5th section of the Renewable Leasehold Conversion Act. Counsel also relied on a case laid before Messrs. Brassington & Gale, surveyors, and their opinion upon it, in which they stated that, from the peculiar situation of the land (being in the middle of other property of Sir. C. Molyneux), the omission of the covenant was a loss to the landlord equivalent to two years' purchase.

Mr. *Frazer*, for the owner.

*Argument.*

The principle of this opinion is quite erroneous. The lands have been assigned several times, and, it must now be presumed, with the consent of the lessor.

LONGFIELD, J.

I think that the 5th section of the Renewable Leasehold Conversion Act was framed to meet cases like the present, and that, therefore, the lessor is entitled to compensation for the non-insertion of the covenant in the conversion order, so far as he can show that its omission causes any injury to the reversion. But what is the amount of injury that its omission causes? I have every respect for the opinion of such eminent gentlemen as Messrs. Brassington and Gale; but I think that, in this case, they have framed their opinion on an entirely erroneous basis. The value of this covenant must be calculated on the ordinary arithmetical principles which regulate the value of future contingent interests. I think two years' purchase is an absurd estimate. I must be guided, in my calculation, by two principles; firstly, the probability of the occurrence; and, I think, it would be found that, in fifty cases, the landlord might, perhaps in one, have availed himself of a covenant like the present; secondly, by what is called, in analogy to the language of insurance, the discounting principle, and which, in this case, is the length of time which would probably elapse without the landlord taking the benefit of the covenant; as, for example, this covenant has been in existence for ninety-six years, without the landlord having taken advantage of it. I think, therefore, that no substantial loss will be sustained by the owner of the reversion by the non-insertion of this covenant. Probably, by reference to a table of logarithms, the loss might be estimated at a farthing a-year.\*

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\* By consent of the parties the rent was increased by one penny a-year.

1861.  
*L. E. Court.*  
*In re*  
 JACKSON.  
*Judgment.*

1860.  
Ch. Appeal.

**Court of Appeal in Chancery.**

**WOODS v. MARTIN and others.**

*Nov. 8, 9.*

Where a purchaser is in possession of lands, under an executed conveyance, and part of the purchase-money has been secured by a bond, the purchaser may come into Equity to have it employed in discharge of an arrear of head-rent due at the date of the conveyance, and is not confined to his remedy at Law, on the covenants in his conveyance.

*Statement.*

THIS was an appeal from a decretal order of the Master of the Rolls, dated the 11th of June 1860. The facts of the case were as follows:—By indenture, dated 18th of November 1858, made between Patrick Martin, of the one part, and William Woods, of the other part, reciting a lease of 1826, from George Mathews to John Martin, of a farm of land, in the county of Down, for two lives, still in being, subject to the yearly rent of £29. 14s. 3½d., and that Martin's interest had become vested in the said Patrick Martin, who had agreed to convey the same to said William Woods, clear from all incumbrances, for the sum of £350, it was witnessed that, in consideration of that sum, therein recited to have been paid by the said William Woods to the said Patrick Martin, the lands were thereby conveyed, subject to the rents and covenants in the lease, to the said William Woods; and said indenture contained covenants for title, quiet possession, freedom from incumbrances and further assurance.

Contemporaneously with the execution of said indenture, William Woods paid to Patrick Martin the sum of £100 in cash, being part of the consideration of £350, mentioned in said indenture; and William Woods, with Thomas Woods and Isaac Lindsay as his sureties, at the same time executed to the said Patrick Martin their bond and warrant of attorney, bearing equal date with said indenture, in the sum of £500, conditioned for the payment of £250 with interest, the balance of said purchase-money. The petitioner stated that an unwritten agreement had been made at the time of the execution of said bond, that William Woods was to be

allowed full credit, out of the amount thereby secured, for any incumbrances which should appear against said lands, and especially for an arrear of rent which the said Patrick Martin admitted to be due thereon, and which he then represented to the said William Woods only amounted to a sum of about £40. Immediately after the execution of said indenture and bond, the said William Woods entered into possession of said farm; but upon a verbal stipulation with the said Patrick Martin, that his doing so was not to be considered as waiving his right to have such incumbrances paid off, and discharged out of such purchase-money. William Woods, upon making inquiry from the reversioner of said lands, as to the amount of rent due thereout, was informed that it amounted to £90. 9s. 8½d.; but that, if same were at once paid, a composition of £67 would be accepted; but on Woods applying to Patrick Martin, he refused to pay, or to allow William Woods, any larger sum than £40, which the reversioner refused to accept, and brought an ejectment for non-payment of the rent up to the 1st of November 1858, against both the said William Woods and Patrick Martin, who were duly served therewith; upon which he, on the 26th of March 1859, obtained a decree for said sum of £90. 9s. 8½d., with costs, which decree was executed on the 23rd of April 1859. Patrick Martin not only still refused to allow the said William Woods to pay off said rent, but threatened to issue execution upon foot of a judgment, which he had entered upon said bond, against both the said William Woods and his sureties, unless the entire amount thereof was paid to him on or before the 18th of May 1859, when the stay of execution therein would expire.

On the 19th of May 1859, William Woods filed his original cause petition in this matter, against Patrick Martin, stating the foregoing facts, and praying for an injunction to restrain the said Patrick Martin from issuing execution upon said bond and warrant, undertaking, if so directed, to bring in and lodge to the credit of this matter the entire amount secured by said bond; and asking a declaration that he was entitled to have the amount of said rent and costs, and all other incumbrances affecting said lands, at the the date of

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*Statement.*

said indenture of 18th November 1858, paid off and discharged out of the amount secured by said bond. Upon the 27th of May 1859, an injunction, until further order, was granted, pursuant to the prayer of said petition. In pursuance of the terms of said injunction order, the said William Woods invested a sum of £250 in Government stock, and transferred the same to the credit of this cause. Patrick Martin filed his answering affidavit, alleging that the said William Woods agreed to become the purchaser of said farm, at the sum of £350, and also to clear, at the landlord's office, whatever arrears of head-rent might be then due; and denying that it was ever agreed that credit should be allowed out of the amount of the bond given for the balance of the purchase-money, for any incumbrance which should appear against said lands, or any arrear of rent. This affidavit further stated, that judgment had been entered on said bond, and registered as a statutable mortgage against the lands of the conusors; but that the said Patrick Martin had, by indenture of 20th April 1859, assigned said statutable mortgage, and all interest therein, to the said John Martin, in satisfaction of a debt of £200, and the arrears of interest thereon. In consequence of the allegations contained in said answering affidavit, the petition was, on the 2nd of August 1859, amended, by making said John Martin and others respondents.

On the hearing before the Master of the Rolls, on the 11th of January 1860, Patrick Martin's Counsel having insisted that the covenants of the deed of 18th of November 1858 had not been broken, and that the petitioners' remedy, if any, was at Law, his Honor directed the further hearing to stand over, to enable the petitioners to bring an action against the said Patrick Martin on the said deed; and an action of covenant having been brought accordingly, Patrick Martin allowed judgment to go by default; but upon the assessment of damages, the said Patrick Martin and John Martin were examined to prove that there was only £40 of rent due to Mr. Mathews; and the Sub-sheriff having let this evidence go to the jury, they found a verdict of £40 for petitioner.

The said cause petition having come on for further hearing on

said judgment at law, and the Sheriff's report of inquiry, on the 11th day of June 1860, the Master of the Rolls made a decretal order, declaring the said William Woods entitled to have the sum of £92. 15s. 8d., being the amount of rent and costs ascertained by the said civil-bill decree to be due, by the said Patrick Martin, to the head-landlord, out of the lands, up to the 1st of November 1858, paid off and discharged out of the amount secured by the said bond for £250; and further declaring the assignment of the judgment entered on the bond, and of the statutable mortgage entered thereon, fraudulent and void as against the petitioner and his sureties; and ordering that the injunction, which issued pursuant to the order of the 27th of May 1859, should be made perpetual, and that the said John and Patrick Martin should re-convey the lands against which they had so registered said judgment as a statutable mortgage, to the said William Woods and his said sureties, according to their respective estates and interests therein; and declaring the said William Woods entitled to his costs of the suit, and procuring such satisfactions and re-conveyances against the said Patrick Martin and John Martin, when taxed, together with the sum of £21. 9s. 9d., the taxed costs of the action at Law; and further declaring that the respondents Thomas Woods and Isaac Lindsay were entitled to be paid their costs by the said William Woods, and that he should have them over, with his own costs, against the other respondent; and directing that, after payment of those sums out of the stock standing to the credit of this matter, the balance, if any, should be transferred to the said Patrick Martin.

The respondents Patrick and John Martin having appealed against the entire of this decree—

Messrs. *Brewster, Lowry and Faloon*, on behalf of William Woods and his sureties, in support of it, cited *Dart. on Vendors*, p. 538, and *Tourville v. Naish (a)*, to show that when the conveyance is executed, and the purchase-money is secured, the purchaser may come into Equity to have it employed in discharge of newly discovered incumbrances.

(a) 3 P. Wms. 306.

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The *Attorney-General*, with whom were Messrs. *Warren* and *H. Fitzgibbon*, for the Martins, relied on *Sug. on Ven.*, p. 684, 11th ed., in which this proposition is laid down—"It seems that if the conveyance be actually executed, the purchaser can obtain no relief, although the money be only secured." It is true that, in *Tourville v. Naish*, Lord Hardwicke says, "Though the purchaser has no remedy at Law against the payment of the residue for which he gave his bond, yet now he has notice of an incumbrance, under which circumstances the Court would stop payment of the money and on the bond." But that is an extrajudicial opinion of Lord Hardwicke, and not the point decided in that case, which was merely that notice before actual payment of the purchase-money is equivalent to notice before the contract; for which *Sir E. Sugden* does cite it as an authority, at page 1036 of his *Vend. and Pur.*, 11th edition.

#### THE LORD CHANCELLOR.

*Judgment.*

Whether it be a mere *dictum* or decision of Lord Hardwicke in *Tourville v. Naish*, we think it both good law and good sense; and, as it is directly in point in the present case, we will act upon it and affirm the decree.

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Mr. *Warren* then submitted that the costs of the appeal ought not to be given against the appellant, as the decretal order had not given credit to the appellant for the interest which accrued on the bond between its date and the issuing of the injunction, and because the appellant ought not to have been ordered to pay the costs of re-assigning the statutable mortgage, and satisfying the judgment entered upon the bond.

The petitioner's Counsel admitting the amount of interest due, the following order was made:—

*Order.*

Affirm the order bearing date the 11th of June 1860, except in so far as same declares the said William Woods entitled to his costs of procuring satisfaction of the said judgment

and re-conveyance of the statutable mortgage in said order mentioned, against the said P. Martin and John Martin; and let the costs thereof be borne and paid by the said William Woods; that the said Patrick Martin is entitled to credit for a sum of £6. 5s., being a half year's interest upon the bond for £350, &c.; and declare the said William Woods bound to give credit for such sum out of the amount decreed to him. No costs of appeal.

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Order.

*Chancery Appeal Hearing Book, 1, f. 385.*

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## KINSELLA v. CAFFREY.

(*In the Rolls.*)

May 1.  
Nov. 20.

Where there is an indefinite bequest to the parent, and, if he die without having or leaving children, over, the children do not take by implication.

Where there is a bequest to the parent for life, and, if he die without having or leaving children, over, the children are not entitled by implication.

Where there is a bequest to the parent for life, and, if he die without having or leaving children, over, and there are matters in the will to raise an inference in favour of the children,

the Court is at liberty to take them in connection with the bequest in the event of the parent dying without having or leaving issue, and to hold that the children are entitled by implication.

A testator bequeathed to each of his grand-nephews, A and B, an annuity for their respective lives, and, in case of the death of either of them, leaving issue, he directed that the annuity of him so dying should go to such issue, if more than one, share and share alike; the share or shares of such child or children as should die under twenty-one or marriage to go to and be equally divided amongst the survivor and survivors of such issue, during their respective natural lives; and if but one, the whole of the annuity to go to such only child for life; and in case of the death of either A or B, without lawful issue living at his death, that the annuity of him so dying should go to the survivor for his life; and in case of the death of both A and B, without leaving issue, or, leaving such, and that such issue should die before the age of twenty-one years, then, after the death of the survivor of such issue of A and B, he directed that the said two annuities should sink into his residuary personal estate. A died without issue.—*Held*, that there was a bequest, by implication, of A's annuity to the children of B.

TIMOTHY KINSELLA, by his will, bearing date the 24th of September 1839, bequeathed to each of his grand-nephews, Laurence Caffrey and Thomas Caffrey, respectively, one annuity of £50, charged on the dividends of his Government stock, payable during their lives half-yearly, at the times of the payment of the dividends of said stock, with a clause against alienation; and he directed that, on the death of either of them, leaving issue lawfully begotten, his annuity should go to such issue equally; the share of such child or children as should happen to die before the age of twenty-one years, or day or days of marriage, to go to and be equally divided amongst the survivor or survivors of such issue, during their respective lives; and if but one child, the whole of said annuity of £50 a-year to go to such only child for life; and in the case of the death of either of them, Laurence and Thomas Caffrey, without lawful issue living at his death, he ordered that his annuity should go to the survivor for life; and in case of the death of both his grand-nephews, "without leaving issue, or, leaving such, and that such issue should die before the age of twenty-one years," in either

case, and immediately after the death of the survivor of such issue, the said two annuities of £50 a-year should sink into and form part of his capital stock and funds, for the residuary purposes of his will; and he bequeathed the residuary fund, subject to an annuity, to his nephew John Kinsella.

The exact terms of the bequest are stated by his Honor, in his judgment, *infra*, pp. 156, *et seq.*

Timothy Kinsella died shortly after his will; and a bill having been filed to carry the trusts of the will into execution, by a decree in the cause, bearing date the 13th of May 1847, two sums of stock were set apart, and directed to be carried to a separate credit, to answer the annuities.

Thomas Caffrey left Ireland in April 1847; and not having been heard of afterwards, an order was made, on the 13th of July 1858, referring it to the Master to inquire and report whether the said Thomas Caffrey was living or dead; and if the said Thomas was married, and, if married, whether he had any child or children. The Master, by his report, dated the 17th of February 1860, found that he was dead, and had died on the 22nd of April 1847, and that he was not married at the time of or previous to his death.

Laurence Caffrey died on the 19th of October 1857, leaving five children, Thomas, Marian, Rosanna, Laurence and John Joseph, all under age.

A motion was now made by John Kinsella, the residuary legatee, that the stock set apart to answer Thomas Caffrey's annuity might be transferred to him.

Mr. *S. Ferguson* and Mr. *Lindsay*, in support of the motion, contended that, on the death of Thomas Caffrey, his annuity sank into the residue. There was no bequest by implication to the children of the survivor. In order to create a gift by implication, a clear intention to that effect must be collected from the will. The intention to be collected in this will was rather against such an implication, for both annuities were to go over, in the event of Thomas and Laurence dying without issue; and there was no reason why one should not go over, on failure of issue of the party entitled

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to it: *Ranelagh v. Ranelagh* (a); *Addison v. Bush* (b); *Towns v. Wentworth* (c); *Sparks v. Restall* (d).

Mr. *Brewster* and Mr. *Brereton*, contra, contended that there was a clear gift by implication. The residuary legatee was to take only "in case of the death of *both* my grand-nephews-without leaving issue, or, leaving such, and that such issue," i. e., the issue of both, "should die under the age of twenty-one years." So long as there was issue of either, the residuary legatee was to take nothing: 1 *Jar.*, p. 462; *Scott v. Bargeman* (e); *Graves v. Holland* (f); *Doyle v. Cartwright* (g); *Doe d. Clift v. Birkhead* (h).

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Judgment.

#### THE MASTER OF THE ROLLS.

The question which arises in this case is, on the construction of the will of Timothy Kinsella, dated the 7th of November 1839. By that will the testator directed, "That by and out of the annual interest, dividends and proceeds of my Government stock, . . . . my executors hereinafter named, and the survivor of them, do and shall, yearly and every year, pay unto each of my grand-nephews, Laurence Caffrey and Thomas Caffrey, respectively, one annuity or clear yearly sum of £50 sterling; the same to be charged upon and paid and payable unto them the said Laurence Caffrey and Thomas Caffrey, out of the annual interest and dividends of all my said Government stock and funds which shall be in the Bank of Ireland at the time of my decease, or out of a sufficient portion of such stock and funds, which I order and direct my executors to set apart and invest, for the purpose of securing unto my said two grand-nephews, Laurence Caffrey and Thomas Caffrey, the said annuities of £50 each, so by me bequeathed to them respectively. . . . . The said annuities or annual sums of £50 each to be paid and payable to the said Laurence Caffrey and Thomas Caffrey, for and during their respective natural lives, by two equal half-yearly pay-

(a) 12 Beav. 200.

(c) 11 Moo., P. C. C., 543.

(e) 2 P. Wms. 68.

(g) 1 Coll. 482.

(b) 14 Beav. 459.

(d) 24 Beav. 21.

(f) 11 Ir. Eq. Rep. 234.

(h) 4 Exch. Rep. 110.

ments, at the respective times of the payment of the interest and dividends upon my said Government stock and funds, or upon the portion thereof to be set apart for that purpose. . . . . And my will and desire is, that the said Laurence Caffrey and Thomas Caffrey, or either of them, shall not sell or dispose of his, her or their said annuity to any person or persons whatsoever; and in case they, or either of them, shall sell or dispose of the same, then and in such case, I order and direct, and my will is, that the annuity of him so selling or disposing of the same shall go to the other of the said annuitants who shall not sell or dispose of the same; and in case of the death of either of them, the said Laurence Caffrey and Thomas Caffrey, leaving issue lawfully begotten, then I order and direct that the said annuity of £50 a-year of him or them so dying shall go to such issue, if more than one, share and share alike; the share or shares of such child or children as shall happen to die before the age of twenty-one years, or day or days of marriage, to go to and be equally divided amongst the survivor and survivors of such issue during their respective natural lives; and if but one child, then the whole of said annuity of £50 a-year to go to such only child, for and during the term of his or her natural life; and in case of the death of either of them, the said Laurence Caffrey and Thomas Caffrey, without lawful issue living at his death, then I order and direct that the annuity of him so dying shall go to the survivor of them, the said Laurence Caffrey and Thomas Caffrey, for and during the term of his natural life."

Before adverting to the clause which next follows, under which it is said that there was a bequest by implication, of Thomas Caffrey's annuity to Laurence Caffrey's children, it may be convenient to state the facts to which I shall now advert, and to consider shortly the effect of the bequests I have already read.

It is found by a report of Master Brooke, dated the 17th of February 1860, that Thomas Caffrey died upon the 22nd of April 1847, and that he never was married. Laurence Caffrey survived Thomas Caffrey, and died in the month of October 1857, leaving Catherine Caffrey his widow (who has taken out administration to the said Laurence Caffrey), and several minor children. Laurence

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*Judgment.*

Caffrey received both annuities of £50 a-year, during his lifetime. Now the short substance of the bequest of Thomas Caffrey's annuity of £50 a-year (which, on the one hand, is claimed by the children of Laurence, and, on the other hand, by John Kinsella, the residuary legatee, under the clauses in the will to which I shall just now advert) is as follows:—That annuity of £50 a-year was bequeathed to Thomas Caffrey for his life. The non-alienation clause need not be referred to, as there was no alienation of the annuity. If Thomas Caffrey had left issue living at his death, which, under the terms of the bequest, I think meant children (a), the annuity of £50, bequeathed to the said Thomas Caffrey for life, was to go amongst his children; and if any died under twenty-one, the survivors were to become entitled, during their respective natural lives, and if but one child, the whole of the annuity was to go to such child, for the term of his natural life. The effect of this part of the will is, that Thomas' children (if he had been married and left children) would have only been entitled for their respective lives. By the provision of the will which next follows, Thomas Caffrey's annuity (in the event which happened, of the said Thomas dying without issue living at his death) was bequeathed to the said Laurence Caffrey for his life. Now it will be observed that there was no express bequest of Thomas Caffrey's annuity to the issue or children of Laurence; and, therefore, the validity of their claim depends on this, whether the clause which I shall now read gave Thomas Caffrey's annuity, by implication, to the children of Laurence, Laurence being dead? That clause is as follows:—"And in case of the death of both my grand-nephews, without leaving issue, or, leaving such, and that such issue should die before the age of twenty-one years, in either of which cases, and from and immediately after the decease of the survivor of such issue of the said Laurence Caffrey and Thomas Caffrey, I order and direct that said two annuities of £50 a-year shall sink into and form part of my capital stock and funds for the residuary purposes in this my will mentioned."

With respect to those residuary purposes, an annuity of £25 was

(a) See *Rhodes v. Rhodes* (27 Beav. 413).

bequeathed to Mary Murphy, charged on the testator's Government stock; and after some other bequests of sums of Government stock, there is the following residuary clause:—"And as to, for and concerning all the rest, residue and remainder of my said capital stock and funds which shall be in the Bank of Ireland at the time of my decease, I give and bequeath the same, and the stock and funds upon or in which the same shall be invested, unto my said nephew John Kinsella (subject to the payment of the annuities and legacies, and the interest and dividends thereon, as hereinbefore mentioned)," for his life, and, after his death, to the children of John Kinsella living at his death, as in the will mentioned; "and as to the rest, residue and remainder of all my property and effects, of whatever nature or kind soever, not hereinbefore disposed of, I give, devise and bequeath the same unto my said nephew John Kinsella, to be disposed of by him as he shall think fit." John Kinsella and another person were named executors, and proved the will.

With respect to the question whether the children of Laurence Caffrey became entitled by implication to Thomas Caffrey's annuity of £50, there is some difficulty, having regard to the authorities.

In *Ranelagh v. Ranelagh* (a), pecuniary legacies were severally given to A, B, C and D, during their natural lives, and, in case of the death of any of them without legitimate issue, his proportion was to be divided amongst the survivors. A died, leaving children. It was held that they did not take by implication, but that on A's death his legacy fell into the residue. Lord Langdale, in giving judgment in that case, stated, amongst other matters:—"In this case the legatee, by the express words of the codicil, takes no interest beyond his life; and if there be no further gift of the legacy, the residuary legatee, who takes subject to all that is not otherwise well given, must be held entitled. The issue of the legatee is named in the codicil only in the description of contingency on which the legacy is given over; and I am unable to find anything which assists in collecting an intention to give to the children. I can collect no particular intention to give this legacy to the residuary legatee (the words residuary legatee were, I presume, used in mistake

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(a) 12 Beav. 200.

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for children); and I cannot answer the question proposed by Sir Thomas Plumer, in *Ex parte Rogers*, why the children were named on the occasion of the gift over. But in that case there seems to have been found some further reason, which does not here exist, for inferring an implied gift; and on the whole, my opinion is, that the legacy falls into the residue. I think it extremely probable that the testator did mean a benefit to the children, but *si voluit non dixit*. I think there is not sufficient to raise the implication, and that the legacy falls into the residue." *Sparks v. Restall* (a) decides the same point. In the case of *Addison v. Bush* (b), there was a bequest of residue to John Lee; but if he should die in the lifetime of the testatrix, without leaving children, then to Charles Lee. John Lee died in the lifetime of the testatrix, leaving issue. It was held that the children of John Lee took nothing by implication. That case differs from the present, in this respect, that the devise to John Lee was not limited to him for life; and in that class of cases the children clearly do not take by implication.

In *Jarman on Wills*, 2nd ed., vol. 1, p. 473, it is laid down as follows:—"In several cases it has been considered that a bequest to a person, and if he shall die without having children, or without leaving children, which means without having had a child born, or without leaving a child living at his decease, does not raise an implied gift to the children, but the parent takes an absolute interest, defeasible on his dying without having had or without leaving a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children he shall have the means of providing for them." Mr. *Jarman* refers to most of the authorities on the subject. The case of *Addison v. Bush* was affirmed on appeal, under the name of *Lee v. Bush* (c); and the principle on which it was affirmed was that adverted to by Mr. *Jarman* in the passage I have read. There was no estate for life given to John Lee. The devise was indefinite; and on the prin-

(a) 24 Beav. 218.

(b) 14 Beav. 459.

(c) 2 D., M. & G. 810.

ciples adverted to by Mr. *Jarman*, there was no ground for holding that the children took an estate by implication, and accordingly, it was held that there was an intestacy. The case of *Ranelagh v. Ranelagh* (a), no doubt, appears to decide that, if there be a bequest to A for life, and if he die without leaving children, to B, and A dies leaving children, the children will not take by implication, and that the bequest will fall into the residue. But that is a different case, and involves a different question from that decided in *Addison v. Busk* (b). Mr. *Jarman*, in his work *on Wills*, 2nd ed., vol. 1, p. 473, states:—"But it seems that where the language of the will necessarily confines the interest of the parent to his life, the Court will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent." Mr. *Jarman* then refers to *Ex parte Rogers* (c). In that case, a testator having by his will bequeathed £1000 to his niece A, by a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, and out of the power of her husband so to do, did therefore direct his executors to secure his niece the interest of the said £1000, independently of her husband, by placing out that sum in trust for his niece; she to enjoy the interest or dividends during her life, and, at her decease without child or children, the principal and interest to be divided amongst such of her sisters as should be then living." Sir T. Plumer was of opinion that, by the combined effect of the will and codicil, he was justified in saying that the children took the legacy by necessary implication. Why, he asked, did the testator mention children if he did not intend them to take? Mr. *Jarman* then proceeds to state that in *Ex parte Rogers* "the implication was evidently aided by the testator's prefatory expres-

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(a) 12 Beav. 200.

(b) 14 Beav. 459; 2 De G., M. & G. 810.

(c) 2 Madd. 449.

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Judgment.

sions in the codicil, which showed that he did not intend to deprive his niece of the legacy bequeathed by the will, but merely to qualify it in a manner suited to her altered condition." Mr. *Jarman* then adverts to the observations of Lord Langdale on that case, in *Ranelagh v. Ranelagh*, and to Lord Cranworth's observations in *Lee v. Bush*. Now the case before Lord Langdale appears to me not to be at all inconsistent with *Ex parte Rogers*. *Ranelagh v. Ranelagh* only decides that, if there be a bequest to A for life, and, if he die without leaving children, to B, the children, in the absence of anything on the face of the will from which an intention can be inferred that they should take, will not be entitled by implication arising solely from the contingency on which the devise over is to take effect. But Sir T. Plumer appears to have held, which is consistent with *Ranelagh v. Ranelagh*, that the Court may, from slight circumstances in connection with the devise over, imply that the testator intended the children to take. With all respect for Lord Cranworth's observations on *Ex parte Rogers*, in *Lee v. Bush*, his Lordship appears to have overlooked the distinction that, in the latter case, the bequest to the parent was an indefinite bequest, and not a bequest for life. The two cases are of an entirely different class, and are distinguishable on the very clear grounds stated by Mr. *Jarman*.

I apprehend, therefore, that the authorities may be classed under three heads:—First; where there is an indefinite bequest to the parent, and, if he die without having or leaving children, to B. In that case, it is clear that the children do not take any interest by implication. Secondly; if there is a bequest to the parent for life, and, if he die without having or leaving children, to B; if the parent dies leaving children, they are not entitled by implication. Thirdly; if, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the Court is at liberty to consider these circumstances in connection with the bequest over, in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the Court inferring a gift in favour of the children.

If this be the result of the authorities, all of which may be reconciled by reducing them to the three classes I have stated, the question is, whether there are circumstances in the present case, taken in connection with the gift over, to justify the Court in holding that the testator intended that the children of Laurence Caffrey should take the £50 a-year bequeathed to Thomas Caffrey for life, he having died unmarried, and consequently without children? The one annuity of £50 was bequeathed to Thomas Caffrey *for life*, with the bequest over, which I have stated, to his children. The other annuity of £50 was bequeathed to Laurence Caffrey for life, with the bequest over, which I have stated, to his children. In the event of either dying without lawful issue (which, I think, means children) living at his death, the annuity of £50 of the party so dying was to go to the survivor of them, the said Thomas Caffrey and Laurence Caffrey, for life. The annuity of Thomas Caffrey was, therefore, in the event, which happened, of his dying without children living at his death, to go over for a certain period, at all events, viz., during the life of Laurence Caffrey. Then follows the provision on which the question mainly turns; that, in case of the death of Thomas Caffrey and Laurence Caffrey “without leaving issue, or, leaving such, and *that such issue should die before the age of twenty-one years*, in either of which cases, and from and immediately after the decease of the survivor of such issue of the said Laurence Caffrey and Thomas, I order and direct that said two annuities of £50 a-year shall sink into and form part of my capital stock and funds for the residuary purposes in this my will mentioned.” Now John Kinsella claims, as residuary legatee, that which, by the passage of the will which I have read, was not to go over and form a fund for the said residuary purposes, in the events which have happened, of Laurence Caffrey having left children. So also the limitation over, in the event of Thomas and Laurence Caffrey dying without leaving issue, or, leaving such, that the issue should die under twenty-one, is to take effect only in the event of both Thomas and Laurence dying without leaving issue, or, leaving such, that the issue should die under twenty-one. So also, the limitation over not being confined to Thomas and Laurence

1860.  
*Rolls.*  
 KINSELLA  
 v.  
 CAFFREY.  
*Judgment.*

1860.  
*Rolls.*  
 KINSELLA  
*v.*  
 CAFFREY.  
*Judgment.*

dying without leaving issue, or, leaving such, and that such issue *should die before the age of twenty-one*, would appear to negative the idea stated by Lord Eldon, in *Doe v. Wilton* (referred to by Mr. *Jarman*), that "nothing is given to them (the children) by this will. They are merely named in the description of the contingency on which the estate was to go over." Why was the event of their attaining twenty-one introduced in this case, if they were intended to take nothing prior to their attaining twenty-one? It appears to me that the testator intended that, on the death of Thomas Caffrey without leaving children, 'Thomas' annuity was to be held by Laurence, in the same manner as his own, and that Laurence's children were to take the same interest in 'Thomas' annuity, on their father's death, that they admittedly take in their father's annuity.

I am of opinion, therefore, on the whole, that this case falls within the third class of cases which I have mentioned, and that the motion of John Kinsella should be refused. It is a case of difficulty; and I shall not give any costs.\*

\* See *Egan v. Morris* (L. & G., temp. Plun., 297).

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In the Matter of BURGESS' TRUSTS,  
 and 11 & 12 Vic., c. 78.

July 6.  
 Nov. 6.

A marriage settlement contained a clause that the provision thereby made and intended for the wife, in the event of her viduity, should be accepted, deemed and taken in full lieu of dower or thirds, to which she might be entitled at Common Law, or otherwise howsoever.—*Held*, that she was barred of her share of her husband's personal estate, under the Statute of Distributions.

THE petition was presented by Elizabeth Jane Allen, formerly the widow of William Burgess, claiming as such, under the Statute of Distributions, her share of a sum of £1544. 1s. 1d., lodged to the credit of this matter, part of the assets of the said William Burgess, who died intestate.

By the settlement executed on the marriage of the petitioner, then Elizabeth Jane Young, with the said William Burgess, and bearing date the 20th of August 1841, certain houses, the property

which she might be entitled at Common Law, or otherwise howsoever.—*Held*, that she was barred of her share of her husband's personal estate, under the Statute of Distributions.

of the petitioner, were assigned to trustees, in trust for William Burgess, for life, and, after the death of the petitioner, to the use of the said William Burgess, his heirs, executors and assigns; and a sum of £500, the property of the said William Burgess, was assigned to the same trustees, in trust to permit him to receive the interest during his life, and, after his decease, in the lifetime of the petitioner, to permit her to receive the interest for her life, and, after her death, in trust for the issue of the marriage, as William Burgess should appoint, and, in default of appointment, equally; and in case of no issue, in trust for Richard Burgess, after the death of the petitioner and William Burgess; and it was agreed and declared to be the true intent and meaning thereof, "that the provision hereby named and intended for the said Elizabeth Jane Young, in the event of her viduity, shall be accepted, deemed and taken in full lieu of dower or thirds, to which she might be entitled at Common Law or otherwise howsoever."

William Burgess died intestate, on the 3rd of May 1846, leaving the petitioner his widow, and three children, the survivor of whom was Mary Elizabeth Burgess. The petitioner claimed one-third of the fund in Court, as his widow, and also a moiety of the shares of her deceased children.

The provisions of the settlement, and the rights of the several parties, are more minutely stated in his Honor's judgment.

Mr. *Warren*, for the petitioner.

The rule, as now established by the authorities, is, that the widow's right to her share, under the Statute of Distributions, can only be barred by express words in her settlement. "Thirds" has been held not to mean a share under the statute, because the widow's share varies; and the words "or otherwise" do not carry the restriction further, for they must be read in connection with the word "thirds:" *Berry v. Berry* (a); *Druce v. Denison* (b); *Gurly v. Gurly* (c); *Colleton v. Garth* (d); *Co. Lit.*, p. 32.

(a) 6 Ir. Chan. Rep. 497.

(b) 6 Ves. 385.

(c) 2 Dr. & Wal. 463; S. C., 8 Cl. & Fin. 759.

(d) 6 Sim. 19.

1860.  
Rolls.  
In re  
BURGESS'  
TRUSTS.  
Statement.

Argument.



1860.

*Rolls.**In re*  
BURGESS'  
TRUSTS.*Argument.*Mr. *Levinge*, for Mary Elizabeth Burgess.

The word "provision," used in this settlement, is an index to the intention of the parties, which was, that the petitioner should have no other benefit from the property of the husband, real or personal, except that provided for her by the settlement. That intention is fully carried out by the words "or otherwise," which are not to be found in any of the authorities relied on, and would be insensible unless they are applicable to a share under the Statute of Distributions: *Walker v. Walker (a)*.

Mr. *Warren*, in reply.

In *Walker v. Walker*, Lord Hardwicke merely decided that the widow was barred of her free bench. The word "otherwise" may have effect by being applied to the widow's right to lands, under any customary right or statute.

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THE MASTER OF THE ROLLS.

Nov. 6.  
*Judgment.*

This is a petition under the Trustee Relief Act, presented by James Bedford Allen and Elizabeth Jane Allen his wife. The facts appear to be as follow:—By indenture of settlement, made in contemplation of the marriage of Richard Burgess with Phillis Duckett, dated the 26th of October 1829, and made between the said Richard Burgess, of the one part, the said Phillis Duckett, of the second part, and Richard Mayberry Duckett and Thomas Murray, since deceased, trustees, of the third part, two policies of insurance on the life of Richard Burgess, for £500 each, and also a sum of £1000, were assigned by him to the trustees, upon trust, after the decease of the said Richard Burgess, to pay the interest of the said two sums of £500, and of said sum of £1000, to the said Phillis Duckett, for her life, and, after her decease, in case there should not be issue of the marriage at the time of her death, on trust to assign the said sums to the executors, administrators and assigns of the said Richard Burgess. There were no issue of the marriage.

Richard Burgess died on the 18th of October 1844, having previously made his will, dated the 16th of November 1842, and thereby

(a) 1 Ves. 54.

bequeathed to William Burgess, his son by a former marriage, the amount of the two policies, subject to testator's wife's life interest therein; and also £500, further portion of the property in his said marriage settlement, subject to his wife's life interest therein. Phillis Burgess proved the will on the 1st of March 1845. William Burgess survived his father, and died intestate on the 3rd of May 1846, in the lifetime of Phillis Burgess, leaving Elizabeth Jane Burgess, otherwise Young, his wife, and two sons, Richard Howard Burgess and William Young Burgess, and one daughter, Mary Elizabeth Burgess, him surviving; and the petitioner submits that thereupon the petitioner Elizabeth Jane Burgess, now Elizabeth Jane Allen, became entitled to one-third of the sums bequeathed by Richard Burgess to William Burgess, subject to the life interest therein of the said Phillis Burgess, and that the children of William Burgess became entitled to the remaining two-thirds. Administration of the goods of William Burgess was, on the 23rd of May 1846, granted to the said Elizabeth Jane Burgess, his widow. Elizabeth Jane Burgess was married again, and is now the wife of James Bedford Allen, and they have filed the present petition. Richard Howard Burgess and William Young Burgess, the sons of the said William Burgess, have died under age, without having been married. Their sister Mary Elizabeth Burgess is now about fourteen years of age. The petition states that the shares of the two deceased children passed, under the Statute of Distributions, in equal shares, to their mother, the petitioner Elizabeth Jane, and to their sister, the said Mary Elizabeth. Richard Mayberry Duckett, the surviving trustee in the settlement of the 26th of October 1829, has transferred to the credit of this matter, under the Trustee Relief Act, £1544. 1s. 11d., which is invested in £3 per cent. consols, and which represents the sums bequeathed to William Burgess by the said Richard Burgess.

The question which arises in the case is, whether the petitioner Elizabeth Jane Allen was barred by the terms of the settlement, executed on her marriage with her first husband, William Burgess, from claiming one-third of the sums bequeathed to said William Burgess by Richard Burgess, the said William Burgess having died

1860.  
*Rolls.*  
*In re*  
**BURGESS'**  
**TRUSTS.**  
*Judgment.*

1860.

*Rolls.**In re*  
**BURGESS'**  
**TRUSTS.***Judgment.*

intestate? That settlement bears date the 20th of August 1841, and was made between Epaphroditus Young and the petitioner, then Elizabeth Jane Young, his daughter, of the first part, the said Richard Burgess and William Burgess, of the second part, and Thomas Carpenter and Richard Mayberry Duckett, of the third part. The settlement, after other recitals, recites that it was agreed that Elizabeth Jane Young should convey her interest in certain premises therein mentioned to the trustees, and that Richard Burgess should assign a sum of £500, part of a sum charged on certain estates in said settlement mentioned, to the trustees, on the trusts thereafter mentioned; and, after such recitals, the indenture witnessed that the said Elizabeth Jane Young assigned her interest in the said premises (describing them) to the trustees, on trust, from and immediately after the death of the said Epaphroditus Young, to the use of William Burgess and his assigns, for life; and, after the death of the said Elizabeth Jane Young, to the use of William Burgess, his heirs, executors, administrators and assigns. I think there is some error in the copy of the settlement sent to me, as to the part I have just read; but it does not appear to be material, having regard to the question in the case. The indenture further witnessed that Richard Burgess assigned said sum of £500 to the trustees, on trust to permit William Burgess to receive the interest for his life, and, after his decease in the lifetime of the said Elizabeth Jane, to permit the said Elizabeth Jane to receive the interest for her life; and, after her death, in the event of there being issue of the marriage, the £500 was to be paid to and amongst such issue, in such shares as the said William Burgess should appoint; and, in default of appointment, amongst the issue, and, in case there should be no issue of the marriage, on trust to pay over the £500 to Richard Burgess, after the death of the said William Burgess and of the said Elizabeth Jane. The deed then contains a covenant by William Burgess to use his best exertions to become a member of an annuity company for the purpose of promoting annuities for widows, and thus to make a further provision for the said Elizabeth Jane; and then follows this provision, on which the question arises:—"And it is further agreed,

by and between all the parties to these presents, and declared to be the true intent and meaning hereof, that the provision hereby made, and intended to be made, for the said Elizabeth Jane Young, in the event of her viduity, shall be accepted, deemed and taken in full lieu and bar of dower or thirds, to which she might be entitled at Common Law, or otherwise howsoever."

The petition alleges that there was a deed of settlement executed on the marriage of the petitioner, but that it does not deal with or affect the stock to the credit of this matter.

With respect to the construction to be put on the clause in the settlement which I have last read, it is necessary to refer to the authorities which have been cited. In the case of *Colleton v. Garth* (a), a rentcharge, expressed to be for jointure, "and in lieu of dower and thirds, at Common Law," was held to be in lieu only of any claim which the wife might have upon her husband's lands, and not to bar her claim under the Statute of Distributions. There was no reference in that case to personal estate. In the case of *Slatter v. Slatter* (b), which was the case of a deed of separation, the provision made for the wife was to be in bar "of all dower or thirds, either at Common Law or by custom, which she at any time thereafter might claim, challenge or demand, from, out of, upon or against the said John Slatter (her husband), or his present or future estate, real or personal." The authorities bearing on the question were not referred to; and Lord Lyndhurst, as the report states, "without entering into any detail of the circumstances of the case, expressed his opinion that there was nothing in the deed to deprive the wife of any interest to which she was entitled in the personal estate of her late husband." I do not think that these cases are applicable to the case before the Court. In *Druce v. Denison* (c), the wife agreed to accept the provisions in the settlement, "in lieu, bar and satisfaction of all dower or thirds, which she might otherwise be entitled to out of all the real and personal estate of her husband." Lord Eldon, in giving judgment (p. 394) said:—"As to the word *thirds*, the clear intention must be taken to mean her

1860.  
Rolls.  
In re  
BURGESS'  
TRUSTS.  
Judgment.

(a) 6 Sim. 19.

(b) 1 Y. & C., Ex. Cas., 28.

(c) 6 Ves. 385.

1860.  
*Rolls.*  
*In re*  
 BURGESS'  
 TRUSTS.  
*Judgment.*

interest in case of intestacy. If that word did not occur, I doubt whether the personal estate would not have been included under the word 'dower.' The word *thirds* is never used accurately. It is a sort of expression, in common parlance, descriptive of an interest upon an intestacy."

That case, it is said by Counsel for the petitioner, does not apply; for here the words are, "in lieu and bar of dower or thirds, to which she might be entitled at Common Law, or otherwise howsoever;" and there is no reference to personal estate. Now, if the words "or otherwise howsoever" had been omitted, the case in 6 *Sim.* would have applied. It is difficult, however, to hold, without acting against the opinion of Lord Eldon, in *Druce v. Denison*, that the words "thirds," at Common Law, or "otherwise howsoever," did not include the claim of a widow, under the Statute of Distributions.

In *Gurly v. Gurly* (a), the jointure was declared by the settlement to be in full lieu, bar and satisfaction of any dower or thirds which the wife should or might claim at *Common Law*, out of all or any of the said estates, real, personal or freehold, of which the intended husband was then, or at any time or times thereafter should become, entitled to or possessed of. Lord Plunket commented on the case in 6 *Sim.*, on the case before Lord Lyndhurst, and decided that the wife was barred of all claim on the personal estate of her husband, under the Statute of Distributions. That decision was affirmed in the House of Lords (b); and the words "at Common Law," in the clause in question in the case, were relied on; but the House of Lords considered that *Druce v. Denison* was applicable, notwithstanding the introduction of these words; and the Lord Chancellor, in giving judgment, said, "The words 'Common Law' in this passage must, therefore, be construed as equivalent to the terms 'according to the general law,' 'according to law,' as distinguished, in ordinary parlance, from Equity; and, unless we put this construction on the clause, the word *personal*, which is contained in it, would have no effect or meaning whatever." The other noble and learned Lords concurred; and it is to be kept

(a) 2 Dr. & Wal. 463.

(b) 8 Cl. & Fin. 759.

in mind that Lord Lyndhurst was the Lord Chancellor when that case was decided, who had, as Chief Baron, decided the case in 1 *Young & Col.*, to which the House of Lords was referred. In the present case, the clause does not refer to personal estate; and, therefore, the same reason does not apply for giving the meaning to the words "at Common Law" which was given to these words in *Gurly v. Gurly*; but I cannot reject the words in this case "or otherwise howsoever;" and I am of opinion, on the whole, having regard to the observations of Lord Eldon, in *Druce v. Denison*, which case was recognised by the House of Lords, in *Gurly v. Gurly*, and having regard also to the judgment of the Law Lords in the latter case, that the petitioner, Elizabeth Jane Allen, was barred by the settlement of 1841 from claiming any part of the personal estate of her first husband, William Burgess, under the Statute of Distributions. I shall make a declaration to that effect; and I presume the parties will agree upon an order, as to the distribution of the fund, subject, of course, to the right to appeal against my decision. It would be desirable that there should be a schedule to the order, explaining the distribution of the fund. I apprehend that administration should be taken out to the two sons of William Gurly, before the order is made. There is some difficulty on the question in this case; and I think it would be reasonable that the costs of the parties should be paid out of the fund in Court.

1860.  
*Rolls.*  
*In re*  
BURGESS'  
TRUSTS.  
*Judgment.*

The ATTORNEY-GENERAL v. EVANS.

June 26, 27.  
Nov. 5.

THE petition was presented under the Acts of the 10 *Vic.*, c. 32, and 12 & 13 *Vic.*, c. 59 (the Land Improvement Acts), for the fee, subject to a rent, by a grant prior to the 14 & 15 *Vic.*, c. 20, has priority over the rent, under the Land Improvement Act, 10 *Vic.*, c. 32, s. 38.

*Semle.*—Where the loan is made to a tenant, the rentcharge has not priority over the rent reserved by his lease, such rent not being a charge or incumbrance, within the meaning of the 38th section of the Land Improvement Act.

1860.  
*Rolls.*  
 ATTORNEY-  
 GENERAL  
 v.  
 EVANS.  
 Statement.

appointment of a receiver, to pay an arrear of rentcharge due to the Crown, in respect of loans made to Richard W. Yielding under the said Acts, for the drainage of the lands of Carrigkerry. The loans were made in 1847. At that time, Richard W. Yielding was seised in fee, under an indenture of the 7th of June 1845, whereby John Evans conveyed the said lands to the said Richard W. Yielding, his heirs and assigns, yielding and paying thereout to the said John Evans, his heirs and assigns, the rent of £100 a-year, payable half-yearly. The deed contained a clause of distress and of re-entry, and perception of the rents and profits until the rent should be satisfied, and a covenant for payment of it.

On the 25th of January 1860, the Court made an order for the appointment of a receiver, without prejudice to the question of priority between the claim of the Crown for the rentcharge, and that of John Evans for the rent reserved by the deed of the 7th of June 1845. The sum claimed by the Crown was £871. A motion was now made on behalf of the Attorney-General, that the receiver should pay the arrears of rentcharge due to the Crown, and the accruing gales thereof, in priority to the rentcharge claimed by John Evans. A cross-motion was also moved by the latter for liberty to proceed at Law for recovery of the rent.

Mr. Serjeant *Lawson* and Mr. *C. Kelly*, for the Attorney-General.

*Argument.*

The 11th section of the 10 *Vic.*, c. 32, provides that "Any owner of land, within the meaning of this Act, who may propose to improve the same under the provisions of this Act, may apply to the Commissioners of Public Works, by memorial, for a loan;" and the word "owner," by the 6th section, includes "any person who shall be entitled to lands under any grant, lease or any other deed or assurance, for an estate in fee." Yielding was owner within that definition; and he applied for a loan, and the application and notices required by the Act were published. No objection was made by Evans. The security given for the loan was the land—not any particular estate in it; and, under the

38th section, the rentcharge had priority of "all charges and incumbrances whatsoever, and whensoever made, save and except quit-rents and rentcharges in lieu of tithes, and also save and except all charges prior in date," under the 5 & 6 *Vic.*, c. 89. The rentcharge, being a charge on the land itself, and not on any particular estate in it, would have priority over an ordinary rent-service, and could be recovered after an eviction by the landlord for non-payment of rent. But this is not a rent-service; it is a rentcharge. Since the Statute of *Quia Emptores*, no rent can be recovered on a conveyance in fee: *Lit.*, s. 217; *Co. Lit.*, p. 143 *b*, *Harg. note*. Such a rent, if secured by a power of distress, is a rentcharge, and a new purchase, which would have descended to the heirs *ex parte paterna*: *Co. Lit.*, 12 *b*; 3 *Pr. on Abstracts*, p. 54. The legal operation of the deed of 1845 was a grant in fee by Evans, and a grant of a rentcharge by Yielding out of the fee so conveyed to him. The rentcharge was, therefore, a charge and incumbrance on Yielding's estate: *Massy v. O'Dell* (a), which was a stronger case, for it was the case of a quit-rent reserved by the Crown. The Renewable Leasehold Conversion Act, and the 14 & 15 *Vic.*, c. 20, cannot affect the question; for they are both subsequent to the fee-farm grant of 1845.

1860.  
*Rolls.*  
ATTORNEY-  
GENERAL  
v.  
EVANS.  
*Argument.*

Mr. Brewster and Mr. Jellett, contra.

This is a case of great hardship, if the Crown has priority; for the money was not expended in the drainage of the lands. Although the rentcharge is created by the 10 *Vic.*, c. 32, the several Drainage Acts, being *in pari materia*, may be referred to in construing its operation. By the first Drainage Act (5 & 6 *Vic.*, c. 89, s. 110), priority is given to the sum advanced in preference to, and in priority over, all incumbrances on such land. That the word "incumbrance" in that Act was used in its proper sense, and contradistinguished from "rent," is plain, from the proviso: "Provided, nevertheless, that any quit or chief-rent issuing thereout, or incumbrance, &c., shall have priority over such charge, to the extent of the value of the lands before such improvement was

(a) 9 Ir. Chan. Rep. 447.



1860.  
Rolls.  
 ATTORNEY-  
 GENERAL  
 v.  
 EVANS.  
 ———  
*Argument.*

effected ;" and a chief or quit-rent is defined "to extend to and include all rent or rents reserved upon, or payable out of, or in relation to, any estate or interest of any person being a proprietor within this Act, for an estate or interest paramount thereto." By the 10 *Vic.*, c. 32, s. 38, "Every such rentcharge to be secured by virtue of this Act shall take priority of all charges and incumbrances whatsoever, and whensoever made, except quit-rents and rentcharges in lieu of tithes; and also, save and except all charges prior in date, if any existing, under and by virtue of an Act passed in the Session of Parliament held in the fifth and sixth years of the reign of her present Majesty," &c. This reference to the Drainage Act shows that, by the 10 *Vic.*, c. 32, it was not intended to extend the security, or to give the rentcharge priority over a rent annexed to an estate paramount to that of the owner, to whom the advance was made. That is the nature of the rent in this case. A rent reserved on a grant in fee is different from an ordinary rentcharge: *Brady v. Fitzgerald* (a). If there is not an actual there is a *quasi* relation of landlord and tenant: *Baker v. Gostling* (b); *Cremen v. Hawkes* (c); *Pluck v. Digges* (d); *In the matter of the Estate of James Tipping* (e); and that is a difference recognised and adopted by the 14 & 15 *Vic.*, c. 20, which gives to a rent secured on a grant in fee all the incidents of a rent-service, except ejectment for non-payment. That Act is retrospective: *Major v. Barton* (f). The whole scope of the Act, and in particular the payment of the sum advanced, in twenty-two years (section 7), shows that the security was to be the interest of the party to whom the money was advanced. If it were intended to secure it on the whole fee-simple, why limit the time within which the advance was to be paid off?

#### THE MASTER OF THE ROLLS.

Nov. 5.  
*Judgment.*

A motion has been made, on the part of the Attorney-General (in pursuance of a reservation contained in an order of the Court, of

(a) 12 Ir. Eq. Rep. 273.

(b) 1 Bing., N. C., 19.

(c) 8 Ir. Eq. Rep. 153, 503.

(d) 1 H. & Br. 81.

(e) 2 Ir. Jur. 172.

(f) 2 Ir. Com. Law Rep. 28.

the 25th of January), that the receiver in this matter should pay the arrears of rentcharge due to the Crown, and the accruing gales thereof, and the petitioner's costs, in priority to the rentcharge, and arrears thereof, claimed by the respondent, John Evans. The petition was filed in this case under the Acts of the 10 Vic., c. 32, and 12 & 13 Vic., c. 59, for the appointment of a receiver, to pay the arrear of rentcharge due to the Crown, and the accruing gales thereof, payable in respect of loans made under said Acts; and an order was made, on the 25th of January, appointing a receiver; but the respondent, John Evans, who claimed to be paid a rentcharge or fee-farm rent payable to him out of the lands over which the receiver was appointed, in priority to the claim of the Crown, the order of the 25th of January concluded as follows:—"And the Court doth reserve the question of the costs of John Evans appearing on this motion, the Court not at present deciding whether the rent payable to him out of the said lands has or has not priority over the claim of the petitioner under the Lands Improvement Act."

The present motion has been now brought forward, the receiver having funds in his hands; and the question which arises is, whether the claim of the Crown has priority over the claim of John Evans?

The facts of the case, so far as they are material to the consideration of the legal question, are as follow:—On the 7th of June 1845, an indenture was executed by and between the said John Evans, of the one part, and Richard W. Yielding, of the other part, whereby, in consideration of the sum of £1999. 19s. 9d., paid by the said Richard W. Yielding to the said John Evans, and also in consideration of the rents and covenants thereafter mentioned and reserved, the said John Evans conveyed to the said William R. Yielding the lands of Carrigkerry, containing 722a. 2r. 30p., situate in the county of Limerick; *Habendum* to the said William R. Yielding, his heirs and assigns, yielding and paying thereout to the said John Evans, his heirs and assigns, the rent of £100 a-year, payable half-yearly, on the 7th of December and 7th of June; and the usual clauses of distress and re-entry

1860.  
*Rolls.*  
ATTORNEY-  
GENERAL  
v.  
EVANS.  
*Judgment.*

1860.  
*Rolls.*  
ATTORNEY-  
GENERAL  
v.  
EVANS.  
*Judgment.*

are contained in the deed, and a covenant to pay the rent, &c. William R. Yielding having applied, in the year 1847, for a loan, to the Board of Works, under the Landed Property Improvement Act (10 *Vic.*, c. 32), obtained an order for the loan of £500, under the provisions of the said Act, which order bears date the 15th of October 1847, and was signed by Sir R. Griffith and W. J. Mulvany, Esq., two of the then Commissioners. The schedule to the order states the owner to be William R. Yielding, and the townland or denomination by which the lands are known as Carrigkerry, being the lands conveyed in fee-farm by John Evans to William R. Yielding by the indenture of the 7th of June 1845. A further loan was made by the Board of Works, to William R. Yielding, of £1000; and the Commissioners now claim an arrear of rentcharge amounting, as I understand, to £871, together with the accruing gales; the effect of which is that, if the claim of the Crown, in respect of such arrear, in priority to Mr. John Evans, be sustainable, he will not for very many years, if ever, receive any part of the fee-farm rent or rentcharge payable to him under the deed of 1845. It appears, from the affidavit of Mr. John Evans, that he received no notice of the application for the loans from William R. Yielding, or from the respondents Richard M. Yielding and Hugh E. Yielding, or from anyone on their behalf, or from the Board of Works, or anyone on their behalf; nor had Mr. John Evans any notice whatever, until long after the granting of the loans, in the petition mentioned, of the fact of William R. Yielding having presented memorials for the loans; and Mr. John Evans positively states, in his affidavit, that he never saw the notices in the *Dublin Gazette*, or heard of the publication thereof, until he read the petition. The affidavit of Mr. John Evans states that, several months after the death of William R. Yielding (who died in the latter end of 1853), the said John Evans heard that a large sum was due to the Commissioners of Public Works, on foot of loans made to William R. Yielding, for the drainage of the said lands, and that little more than half the sum had been expended on drainage or improvements; whereupon he addressed a letter to the secretary of the Commissioners, dated the

21st of December 1854. The letter is set out at length in the affidavit; and it explains the facts to the Commissioners, and contains the following passage:—"As I was no party to the application made for this money, my interest cannot be affected by it, excepting so far as this additional charge upon the property may prevent a solvent tenant from taking it; and, as I have no remedy, except by distress, my head-rent, in that case, may be lost. It is, therefore, necessary that the Board should ascertain to what extent the money advanced for draining this portion of the late Mr. Yielding's property has been *bona fide* expended thereon, in order that the property may only be charged with what has actually been laid out upon it, and the sureties called upon for the balance." The affidavit further states that Mr. John Evans called on the Commissioners to proceed to recover the arrears, against the parties entitled to the estate of William R. Yielding, but that they declined to do so; and the affidavit of John Evans further states that he believes that, if proceedings had been taken from time to time to recover the instalments, as they became due, against the said William R. Yielding, or those representing his estate, or deriving under him, the amount of the instalments could have been recovered. The affidavit states that the Board of Works did not answer the letter of Mr. John Evans.

Two affidavits are made, one by the solicitor, and the other by the land agent of Mr. John Evans, corroborating some of the statements made by Mr. John Evans. It is impossible to conceive a much more unjust proceeding than that a person who stands in the position of a *quasi* landlord is to be improved out of his property by such proceedings as I have stated. The question, however, which I have to decide, is not the justice or injustice of the case, but what is the construction to be put on the statute?

It has been contended, on the part of the Crown, that, even in the ordinary case of landlord and tenant, if the tenant falls within the definition of an owner under the statute, the Board of Works may advance loans to the tenant without notice to the landlord—may omit to take the trouble to see that the money advanced is expended—may lie by for years, without making the tenant pay the instalments; and then may appoint a receiver over the tenant's

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interest, and insist that the landlord is entitled to no rent, until the large arrear due for instalments, accrued by the neglect of the Board of Works to proceed sooner, has been paid. So far as that proposition is concerned, I am of opinion that there is no foundation for it, and that a rent-service is not a charge or incumbrance, within the meaning of the section of the statute to which I shall hereafter refer.

It is, however, secondly insisted that the rent payable to Mr. John Evans, under the deed of the 7th of June 1845, is a rent-charge, Mr. John Evans having conveyed the fee to Mr. Richard W. Yielding. I think it must be so considered (at all events so far as the claim of the Commissioners of Public Works is concerned), notwithstanding the provisions of 14 & 15 Vic., c. 20, and that the rights or priority of the Commissioners, which existed at the time that Act was passed, cannot be affected thereby. Independently of that Act, the rent reserved by the deed of the 7th of June 1845 was, I apprehend, a rentcharge. Sir Michael O'Loghlen so held it to be in *Stevelly v. Murphy* (a); and although, in *Brady v. Fitzgerald* (b), the Lord Chancellor differed from Sir Michael O'Loghlen, as to a bill in Equity being sustainable, where there were no legal impediments to the recovery of the rent reserved on a grant in fee, yet his Lordship considered that such rent was a rentcharge. Mr. *Hargrave*, a high authority on a question of conveyancing, in a note to *Co. Lit.*, p. 143 b, note 235, says:—"After the Statute of *Quia Emptores*, granting in fee-farm, except by the King, became impracticable, because the grantor parting with the fee is, by operation of that statute, without any reversion; and without a reversion there cannot be a rent-service, as *Littleton* himself writes, in section 216; yet I have seen a modern grant in fee, of a large estate in Ireland, reserving a perpetual rent of great value; but such rent, considered as a fee-farm rent, I thought clearly void. However as, in the case I allude to, the conveyance contained a power for the grantor, his heirs and assigns, to distrain for the rent when in arrear, and also a power to enter, and receive the profits, until all arrears should be paid, the rent might be good as a rent-charge; and so, on being consulted, I held it to be." It is, therefore,

(a) 2 Ir. Eq. Rep. 456.

(b) 12 Ir. Eq. Rep. 273.

clear that, without reference to the Act of the 14 & 15 of *The Queen*, c. 20, the rent reserved on the indenture of the 7th of June 1845 was a rentcharge; and, without offering any opinion as to the effect of that Act, as to cases occurring after the statute, I am of opinion that the legal rights and priority of the Crown which existed when the Act was passed (which was passed subsequent to the loans) were not affected by that Act.

It is now, therefore, necessary to consider some of the sections of the statute 10 *Vic.*, c. 32, under which Act the loans were made to Mr. William R. Yielding. The 37th section provides that, in case any loan shall be made under the Act, the lands specified in the order of the Commissioners of Public Works shall, from the date of such order, become charged with the payment to Her Majesty of an annual rentcharge of £6. 10s. 0d. for every £100 of every such loan, from time to time advanced, including certain costs and expenses, in said section mentioned; and the 38th section enacts that, "Every such rentcharge, to be secured by virtue of this Act, shall take priority of all charges and incumbrances whatsoever, and whensoever made, except quit-rents and rentcharges in lieu of tithes, and also save and except all charges prior in date, if any, existing under and by virtue of an Act passed in the Session of Parliament held in the fifth and sixth years of the reign of Her present Majesty, entitled 'An Act to Promote the Drainage of Lands, and Improvement of Navigation and Water-power, in connexion with such Drainage in Ireland,' and two other Acts since passed, amending same Act, or under or by virtue of this Act." The 39th section then provides the mode of recovering the rentcharge, by the presentation of a petition in the name of the Attorney-General, for the appointment of a receiver. The present petition was presented under that section.

The only question, I apprehend, is, whether the rentcharge reserved by the deed of the 7th of June 1845 is a "charge and incumbrance" within the 38th section? I am of opinion that it is. I had occasion to consider the question whether a rentcharge was a charge or incumbrance, in the case of *Massy v. O'Dell* (a); and the authorities

(a) 9 *Ir. Chan. Rep.* 447, 448.

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to which I then referred establish that it is. That decision was affirmed on appeal. It is not necessary to go through the cases again. I am, therefore, of opinion that I must make the order sought by the Crown, and direct that the receiver shall pay the arrears of rentcharge due to the Crown under the provisions of the 10 *Vic.*, c. 32, and the future accruing gales thereof, and the Attorney-General's costs, in priority to the rentcharge claimed by the said John Evans.

With respect to the application made by the respondent, that I should permit him to proceed at Law, I think I should not do so. On reference to the clause of re-entry, in the indenture of the 7th of June 1845, it is not a clause of forfeiture for non-payment of the rentcharge thereby reserved; it is only a power to enter, and receive the profits until the arrears are satisfied; and, as *Littleton* lays down, "The feoffor shall have the land, but in manner *as and for a distress*, until he be satisfied of the rent due," &c. The authorities on this subject were referred to in *Smith v. Smith (a)*. If I were to permit the respondent either to distrain or bring an ejectment, and enter, the effect would be to give him priority over the Crown, in contravention to the 38th section of the 10 *Vic.*, c. 32. I regret to be obliged to make an order against the respondent, which I consider to be very unjust; but the terms of the statute are clear. The injustice does not arise from the statute, but from the Board of Works not having enforced payment of the instalments as they fell due.

(a) 5 Ir. Chan. Rep. 97.

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THE petition in this matter was filed for the administration of the assets of Colonel Charles Edward Gordon, by William Duckett, who claimed to be a specialty creditor, under the following circumstances. In 1843, William Duckett was seised for life of the lands of Rathellin, with power, when in possession, to charge them with a fortune for any wife he should marry, at the rate of £10 per cent., for each £100 such wife should bring or give to him as her portion. William Duckett was also seised in fee of the lands of Rathlyon and Coppenagh. In January 1843, William Duckett married Harriett Isabella Anne Gordon, the daughter of the testator Colonel Gordon, and a settlement was executed in contemplation of the marriage, on the 17th of January 1843. That settlement recited that it had been agreed that, in order to make a suitable provision for the intended wife, during the lifetime of William Duckett, by way of pin-money, and after his death by way of jointure, the said William Duckett should convey the said several lands, upon the trusts thereafter expressed:—"And whereas the marriage portion of the said Harriett I. A. Gordon is to be paid to the said William Duckett, and whereas the said Charles Edward Gordon is minded and desirous to give to his daughter the said Harriett I. A. Gordon, as a marriage portion, such sum or child's share as he may be

A father joined in 'a settlement executed on the marriage of his daughter, which contained a recital that he was desirous to give her, as a marriage portion, such sum or child's share as he might be entitled to dispose of, which child's share it was calculated would be at the least £5000, but the same, or the precise amount thereof, could not be ascertained until his decease; and the intended husband, who had a power to jointure to the amount of £10 per cent. on the fortune which he should receive with his wife, appointed a jointure of £500 a-year,

which was also collaterally secured on other lands, not the subject of the power. The daughter died in G.'s lifetime.

*Held*, that the recital amounted to an absolute covenant that his daughter should have, on his death, an equal share of his personal estate with his other children.

*Seemle*—If it was not a covenant, it would have amounted to a binding representation to the same effect.

*Held also*, that the obligation was not discharged by the daughter's death in his lifetime.

*Held also*, in calculating the amount payable under the covenant, sums advanced to other children by the testator in his lifetime should be taken into account and be added to the assets.

*Held also*, that interest should not be calculated on the sums so advanced.



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entitled to dispose of, which child's share it is calculated will be at the least £5000, but the same or the precise amount thereof cannot be ascertained until the decease of him the said Charles Edward Gordon; and whereas, in the event of the portion of the said Harriett I. A. Gordon falling short of £5000, the said William Duckett could not charge the said lands of Rathellin with a jointure of £500 per annum, it was agreed, by and between the said parties, that the other lands hereinafter mentioned, and of which the said William Duckett is so seised in fee-simple, should be charged and incumbered with the entire of said sum of £500, or so much thereof as the said William Duckett would be unable to charge upon the said lands of Rathellin, in aid of and subsidiary to the charge hereinafter to be made upon the said lands of Rathellin; it being the true intent and meaning of the parties hereto, that, under any circumstances, the said Harriett I. A. Gordon should have her jointure of £500 effectually charged upon the lands hereinafter granted and appointed, or intended so to be:" and in pursuance of said agreement, and in consideration of the marriage, William Duckett conveyed to trustees the said lands of Rathlyon and Coppengagh, of which he was seised in fee, for ninety-nine years, in trust to pay out of the said lands £100 a-year pin-money, and, subject thereto, to the use of William Duckett for life; and the said William Duckett, in consideration of the said intended marriage, and in consideration of the portion or fortune of the said Harriett I. A. Gordon, agreed to be paid, as thereinbefore stated, to the said William Duckett, and in pursuance of his power to jointure, appointed a jointure of £500 a-year for the said Harriett I. A. Gordon, and further conveyed the fee-simple lands, upon trust that, in case he did not receive a fortune with the said Harriett I. A. Gordon sufficient to enable him, under the said power, to charge the jointure of £500 on the said lands of Rathellin, the rents of the fee-simple lands should be applied to pay such jointure, or to make up the deficiency thereof.

The marriage was celebrated shortly afterwards, and there was issue of it, three sons and one daughter. William Duckett died previously to the 17th of February 1854. Colonel Gordon made

his will on the 17th of February 1854, by which he recited that he had given £2000 to his eldest son, Charles Edward Parke Gordon, and £2000 to his youngest son, John Henry Gordon; he bequeathed £2000 to Charles Duckett, the youngest son of his deceased daughter, and, if he should die under twenty-one, he bequeathed the said £2000 to his grand-daughter, Harriett Duckett, and he bequeathed a specific sum of £500 to be divided between his said two sons, and he devised and bequeathed some other property to his sons and to his wife, and appointed his sons and Alexander Jopp his executors, and made his sons residuary legatees. The terms of the will are stated in the judgment, *infra*, p. 187.

The petition having been referred to Master Litton, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850, he, by a decretal order, made on the 16th of June 1860, declared that, by the settlement of the 17th of January 1843, the testator, Charles Edward Gordon, contracted to give to the petitioner, William Duckett, as much money as either of his sons should thereafter receive from him, either by gift in his lifetime, or by bequest, or intestacy, and directed accounts accordingly.

The respondents, the sons and executors of the petitioner, appealed from the order.

Mr. *Brewster* and Mr. *F. White*, for the petitioner.

First; the recital in the settlement was binding on the testator and his assets, as a covenant: *Hollis v. Carr* (a); *Wood v. The Copper-miners Company* (b); *Barkworth v. Young* (c); *Jones v. How* (d); or as a representation: *Hodgson v. Hutchinson* (e).

Secondly; the expression "child's share," in the settlement, means, that there shall be an equal division of his property among his children, so that Mrs. Duckett shall get an equal share of it: *Willis v. Black* (f); to the exclusion of specific legacies; and in taking account of the "child's shares," the testator's sons are bound to bring into hotchpot the sums advanced

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(a) 1 Vern. 431.

(b) 7 Man., G. & Sc. 906.

(c) 4 Drew. 18.

(d) 7 Hare, 267.

(e) 1 Sim. & St. 525.

(f) 5 Vin. Ab. 522, pl. 34.

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to them by the testator in his lifetime, and interest from the date of the advances; for the testator could not act in derogation of to the contract which he had entered into: *Andrewes v. George* (a); *Westcott v. Culliford* (b).

Mr. Warren and Mr. Forbes Johnson, contra.

First; no case has been cited where a mere recital, without something more, has been held to be a covenant: *Farrell v. Hildridge* (c). The recital is so vague and uncertain, that it would be very difficult to carry it into effect; but if any intention can be collected from it, it would appear to be that Mrs. Duckett was to receive a portion conditionally on her surviving her father.

Secondly; if it amounts to an unconditional covenant, the true construction of it was, that the testator had an unlimited power of disposition, during his lifetime, and his daughter would be entitled only to a share of the assets of which he should die possessed: *Logan v. Wienholt* (d); *Lord St. Leonards' Handy Book of Property Law*, p. 106; *Jones v. Martin* (e); *Randall v. Willis* (f); *Eyre v. Munro* (g).

Nov. 3.  
Judgment.

THE MASTER OF THE ROLLS.

This case is an appeal from the decretal order of E. Litton, Esq., the Master in the matter, which order was signed on the 16th of June. The petition was filed by the petitioner William Duckett, Esq., claiming to be a creditor by covenant, of the late Colonel Charles Edward Gordon deceased, whose assets are sought to be administered in this suit. The facts of the case are as follow:—The petitioner William Duckett was, on and previous to the 17th of January 1843, seised for life of the lands of Rathellin, with a power to the said William Duckett, when in possession, to charge said lands with a jointure for any wife he should marry, at the rate of £10 per cent. by the year, for each £100 such wife should bring

(a) 3 Sim. 393.

(c) 4 C. B. 840.

(e) 5 Ves. 265.

(b) 3 Hare, 265.

(d) 6 Cl. & Fin. 610.

(f) 5 Ves. 281.

(g) 3 K. & J. 309.

or give to him, the said William Duckett, as her portion. I have not seen the instrument creating the power, but I have stated it from a recital contained in the settlement which I shall just now refer to. The said William Duckett was also seised in fee of the lands of Rathlyon and Coppenagh, situate in the county of Carlow. The said William Duckett being so seised, a settlement was executed, in contemplation of his marriage with Harriett Isabella Anne Gordon, daughter of the said Colonel Gordon. The settlement bears date the 17th of January 1843, and was made and executed by and between the said William Duckett, of the first part, Colonel Gordon and his said daughter, of the second part, and certain trustees, of the third and fourth parts; and, after reciting the facts I have stated, it further recites that, upon the treaty for said intended marriage, it was agreed that, in order to make a suitable provision for the said Harriett I. A. Gordon, as well during the lifetime of the said William Duckett, by way of pin-money, as, after his decease, by way of jointure, he, the said William Duckett, should settle, convey and assure the said several lands and premises upon the trusts thereafter expressed; and then there is a recital in the following words:—"And whereas the marriage portion of the said Harriett Isabella Anne Gordon is to be paid to the said William Duckett, and whereas the said Charles Edward Gordon is minded and desirous to give unto his daughter, the said Harriett Isabella Anne Gordon, as a marriage portion, such sum or child's share as he may be enabled to dispose of, which child's share it is calculated will be at the least £5000, but the same, or the precise amount thereof, cannot be ascertained until the decease of him the said Charles Edward Gordon; and whereas, in the event of the portion of the said Harriett Isabella Anne Gordon falling short of £5000, the said William Duckett could not charge the said lands of Rathellin with a jointure of £500 per annum, it was agreed, by and between the said parties, that the other lands hereinafter mentioned, and of which the said William Duckett is so seised in fee-simple, should be charged and incumbered with the entire of said sum of £500, or so much thereof as the said William Duckett would be unable to charge upon the said lands of Rathellin, in aid of, and

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subsidiary to, the charge hereinafter to be made upon the said lands of Rathellin; it being the true intent and meaning of the parties hereto that, under any circumstances, the said Harriett Isabella Anne Gordon should have her jointure of £500 effectually charged upon the lands hereinafter granted and appointed, or intended so to be;” and, after such recitals, it was, by the said indenture, witnessed that, “in pursuance of the said agreement, and in consideration of said intended marriage,” &c., the said William Duckett conveyed the said lands of Rathellin to the said trustees, of the fourth part, for the term of ninety-nine years, on trust that they should, out of the rents and profits, pay £100 a-year to the said Harriett, by way of pin-money; and, subject to the said trust, to the use of said William Duckett for his life; and the indenture further witnessed that, “in consideration of the said intended marriage, and in consideration of the portion or fortune of the said Harriett Isabella Anne Gordon, agreed to be paid, as hereinbefore stated, to the said William Duckett,” he, the said William Duckett, in pursuance of the recited power of jointuring, charged the said lands of Rathellin with a jointure of £500 a-year for the said Harriett; and the indenture further witnessed that, “in further pursuance of the said agreement, and for and in consideration of the said intended marriage,” &c., the said William Duckett conveyed to the said trustees, of the third part, the said lands of which the said William Duckett was seised in fee, upon trust that, in case the said William Duckett did not, in his lifetime, receive a portion with the said Harriett sufficient to enable him, under the power hereinbefore mentioned, to charge the jointure of £500 on the said lands of Rathellin, that the rents of the fee-simple lands, so conveyed to the said trustees, of the third part, should be applied to pay such jointure, or to make up the deficiency therein. The marriage took place shortly afterwards, and the petitioner William Duckett, and his said wife, had four children, three sons and a daughter.

The said Colonel Charles Edward Gordon had three children, viz., his said daughter Harriett I. A. Duckett, and two sons, Charles Edward Parke Gordon and John Henry Gordon. The said Harriett I. A. Duckett died in her father’s lifetime, and before the making

of his will, hereinafter mentioned, and her father made no provision for her in his lifetime, and made no payment to the petitioner in pursuance of the covenant or contract contained in the said marriage settlement.

The said Colonel Charles Edward Gordon made his will, dated the 17th of February 1854, and he thereby directed his debts and funeral expenses to be paid; and after reciting that in his lifetime the testator had given £2000 to his eldest son, Charles Edward Parke Gordon, captain in the 75th Regiment, for the purchase of his commission, and further reciting that the testator had given, in his lifetime, £2000 to his youngest son, John Henry Gordon, to set him up in the business of wine-merchant, the will proceeds thus:—  
“And now that my beloved daughter Harriett Isabella Anne Gordon has died, I give, devise and bequeath to her youngest son, Charles Duckett, the sum of £2000, upon my death, to be held in trust for him until he attains the age of twenty-one years, and the interest thereon to be used towards his education, and such expenses as may be deemed necessary during his minority;” and in the event of the said Charles Duckett dying under twenty-one, the testator bequeathed the said sum of £2000 to his grand-daughter, Harriet Duckett. The will then proceeds thus:—“And whereas, on the death of the Hon. Mrs. Hutcheson, I am entitled to the sum of £500, bequeathed to me under the will of the late Lord Glenbervie, it is my will and desire that the said sum of £500 shall be divided between my sons Charles Edward Parke Gordon and John Henry Gordon.” The testator then bequeathed a sum of £1000, to which he stated his representatives would be entitled, in the event of his pre-deceasing his sister, between his said sons. The testator then bequeathed his share of his fisheries on the river Dee to his son Charles Edward Parke Gordon. Then follows a bequest to testator’s wife, of some trifling articles, and he appointed his said sons, and his son-in-law, the petitioner, and Alexander Jopp, his executors, and made his said sons his residuary legatees. The petitioner William Duckett, and the respondent John Henry Gordon, proved the will, saving the rights of the two other executors.

Charles Edward Parke Gordon denies the accuracy of the recital in his father’s will, that he had given him £2000, and he says he

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only received £1450. I believe the other son also disputes the sum alleged to have been advanced to him.

The first question which arises is, whether there was any covenant or contract, by the said Colonel Gordon with the petitioner, contained in the settlement of the 17th of January 1843 (executed on the marriage of the petitioner with Harriett I. A. Gordon, daughter of the said Colonel Gordon), to pay to the petitioner any sum as the portion or fortune of the said Harriett I. A. Gordon, or any representation made by the said Colonel Gordon, by said settlement, as to his intentions, binding on him and on his assets?

Secondly; if there was any contract or agreement binding on the late Colonel Gordon, is the construction put upon such contract by the Master the right construction?

Thirdly; if there was a binding contract, and if the construction put upon it by the Master is not the true construction, what is the construction to be put upon it?

Fourthly; did the death of Harriett I. A. Duckett, in her father's lifetime, render the performance of the contract impossible?

Fifthly; if there was a contract binding on the late Colonel Gordon, at the time of his death, and if the construction which I think should be put upon the contract be correct, how is such contract now to be carried into effect?

With respect to the first question, I am of opinion that there was in the said settlement a covenant or contract entered into by the late Colonel Gordon with his son-in-law, the petitioner. The terms of the contract are very vague; but the recitals in the settlement show that the petitioner was tenant for life of the lands of Rathellin, and had a jointuring power entitling him to charge a jointure at the rate of £10 a-year for every £100 his wife "should give or bring to him," the said William Duckett, as her portion. It was clearly intended by the parties to the settlement that the jointuring power should be executed, although it may be very doubtful whether the agreement of the late Colonel Gordon, contained in the recital I have read, authorised the execution of the power. If it was intended that the power of jointuring should be exercised, it must, I think, have been intended that the said recital should amount to a contract

binding on the late Colonel Gordon. That a recital may amount to a binding contract is established by the authorities which have been referred to. That the recital was intended to amount to an agreement is, in my opinion, also established, by what follows the recital; for it is by the deed witnessed that, "in consideration of the intended marriage, and in consideration of the portion or fortune of the said Harriett I. A. Gordon, agreed to be paid, as hereinafter stated, to the said William Duckett," he the said William Duckett conveyed the lands of Rathellin to the trustees; and the power to jointure purports to be executed. I concur, therefore, with the Master, in his opinion that there was a binding contract entered into with the petitioner by the late Colonel Gordon, to give a marriage portion with his daughter, to be paid to the petitioner on Colonel Gordon's death. I doubt whether it is open to the appellants to raise this question now, as it appears, from the recitals in the Master's order, that he made an order, dated the 16th of September 1858, which has not been appealed from, to pay the petitioner a part of his claim, which was accordingly paid, and which should not have been paid except on the assumption that there was a contract binding on the late Colonel Gordon. As I am of opinion that there was a contract, it is not necessary to decide whether, if there was no contract, there was a representation of intention, binding on the late Colonel Gordon, and on his representatives. The principal authority on the latter point is *Hammersley v. Biel* (a). I think, however, there is strong ground for holding, on the authority of that case, that there was a representation of intention on the part of the late Colonel Gordon, binding on him, and on his assets. A difficulty arises, as to my finally deciding, at present, whether there was such contract or representation, on the ground that the minor, Charles Duckett, was not represented by Counsel or solicitor or guardian, before the Master, or before me; but I shall advert more particularly to that difficulty just now; it was not raised by Counsel.

The second question is, if there was a contract, or agreement or representation, in the settlement, binding on the late Colonel Gordon, is the construction put upon it by the Master the correct construction?

(a) 12 Cl. & F. 45.

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The Master has declared by his decretal order that, according to the true construction and effect of the marriage settlement of the 17th of January 1843, the testator, Charles Edward Gordon, contracted to give to the petitioner, William Duckett, as much money as either of his sons should thereafter receive from him, either by gift in his lifetime, or by bequest or intestacy. I am of opinion that that declaration is erroneous. I understand that the Master made the declaration on the authority of the cases of *Willis v. Black* (a) and *Logan v. Weinhold* (b); but I do not think that those cases are applicable, having regard to the terms of the settlement in the present case. Suppose the testator had property in his lifetime of the value of £6000, which, I believe, was about the value, and that he had advanced to one of his sons in his lifetime £3000, and left assets, after payment of funeral expenses and debts, to the amount of £3000, the petitioner would have been entitled, according to the Master's decision, to the whole of such assets, and the other son would have been entitled to nothing. So also, according to the construction put by the Master on the contract, if the testator had not advanced either of his sons in his lifetime, and had given nothing, or only a nominal sum, to one or both of his sons, and had bequeathed his property to a stranger, the petitioner would have been entitled to nothing, or only to a sum equal to such nominal sum bequeathed to one of the sons. Many other cases might be suggested, equally inconsistent with what was the intention of the parties to the settlement. The words of the recital are as follow:—"And whereas the marriage portion of the said Harriett Isabella Anne Gordon is to be paid to the said William Duckett; and whereas the said Charles Edward Gordon is minded and desirous to give unto his daughter, the said Harriett, as a marriage portion, such sum or child's share as he may be entitled to dispose of, which child's share it is calculated will be at the least £5000, but the same, or the precise amount thereof, cannot be ascertained until the decease of him, the said Charles Edward Gordon;" and the recital then proceeds to provide for the event of the portion being less than £5000. The question is, what is the meaning of

(a) 4 Russ. 170.

(b) 1 Cl. & F. 611.

the term "child's share?" I cannot concur with the Master's opinion on that point, as stated in the declaration contained in the decretal order.

Thirdly; if there was a contract or a representation binding on the late Colonel Gordon, and on his assets, and, if the construction put upon the settlement by the Master is not the true construction, the question is, what is the true construction? That depends, as I have already stated, upon the meaning of the term "child's share." I am of opinion that the contract of the late Colonel Gordon was, that his daughter Harriett should have as her portion, on his death, an equal share of his personal estate with his other children, and that such portion should be paid to the petitioner.

In *Lord St. Leonards' Handy Book on Property Law*, 7th ed., pp. 157, 158 (a work containing a greater amount of learning than any work of a similar size), it is thus laid down:—"It is not unusual for a parent, upon a daughter's marriage, to agree to leave her at his death a fortune equal to his other children. Such an agreement does not confine or restrict the father's power; he may alter the nature of his property from personal to real, or he may give scope to projects, or indulge in a free and unlimited expense; but he will not be allowed to entertain mere partial inclinations towards one child at the expense of another. If his partiality do rise so high, and he will make a difference, he must do it directly, absolutely, and by surrendering all his own right and interest; he must give out-and-out; he must not exercise his power by an act which is to take effect not against his own interest, but only at a time when his own interest will cease. He cannot, for instance, give property in his lifetime to one child, reserving the interest to himself; for such a gift is in fact testamentary, and in fraud of his agreement."

In the case of *Jones v. Martin*, reported in a note to 5 *Vesey*, p. 260, the law was laid down in the House of Lords, in the manner stated by *Lord St. Leonards*, in his *Handy Book*. The case of *Jones v. Martin* is referred to by Vice-Chancellor Wood, in *Byre v. Munro* (a). In the case of *Barkworth v. Young* (b), a question

(a) 3 Kay & J. 309.

(b) 4 Drew. 18.

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*Rolls.*  
DUCKETT  
v.  
GORDON.  
*Judgment.*

1860.  
*Rolls.*  
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arose on demurrer, as to the effect of a marriage contract entered into with the plaintiff, on his marriage with the daughter of R. C. Young. The contract of R. C. Young with the plaintiff, as stated in one part of the bill, was that he would, at his death, leave to his daughter an equal share of his property with his other children; and in another part of the bill, the contract would appear to have been that, at his death, his daughter should have an equal share with his other children. That is, I apprehend, what was meant in this case by "a child's share." Vice-Chancellor Kindersley, in his judgment on the demurrer (p. 18), considered that there was no difference between those two statements in the bill, and said:—"According to either of the two forms of expression, the promise was capable of being performed in two ways—either by bequeathing to his daughter by will an equal share, or by dying intestate, and leaving his children to share equally, under the Statute of Distributions." That case differs from the present only in this, that here the contract was that the share of Harriett should be paid to the petitioner; but that does not affect the question as to what was the meaning of the term "child's share." A question arose in the above case of *Barkworth v. Young*, to which I shall advert just now, in considering another part of this case.

In the case of *Jones v. How* (a), decided by Vice-Chancellor Wigram, which was referred to and considered by Vice-Chancellor Kindersley, in *Barkworth v. Young*, a father, on the marriage of his daughter with the plaintiff, covenanted with the plaintiff that he would, by deed or will, leave and bequeath to his daughter an equal share with his other children. That is, I apprehend, what in the settlement in the present case is called "a child's share." The bill in that case was dismissed, on a ground that I shall advert to just now, that the contract became incapable of performance, by the death of the daughter without issue in her father's lifetime; but it was not doubted that the contract was in its inception a valid contract, and that a father might contract with the intended husband of his daughter, that he would give or leave her an equal share of his property with his other children; *i. e.*, in other words, that her portion was to be "a child's share." If the term

(a) 7 Hare, 267.

"child's share," in the present case, meant that Harriett should have an equal share of the testator's property, and that the contract in the present case was substantially the same as in the cases I have referred to, except that the portion of Harriett was to be paid to the petitioner, the declaration in the Master's order is incorrect in declaring that, according to the true construction of the settlement of the 17th of January 1843, the testator contracted to give to the petitioner as much money as "either of his sons should thereafter receive from him, either by gift in his lifetime, or by bequest or intestacy."

The next question which arises (supposing there was a valid and binding agreement or representation made by the testator) is, whether he was discharged from its obligations by the death of Harriett I. A. Duckett in his lifetime? In *Jones v. How (a)*, to which I have already referred, the father, on the marriage of his daughter, covenanted with the plaintiff that he would by deed or will give, leave and bequeath to the daughter an equal share of his real and personal estate with his other children. She died in her father's lifetime, without issue; and, on the latter ground, it was held that the agreement was incapable of being performed. That case was considered by Vice-Chancellor Kindersley, in the case of *Barkworth v. Young (b)*, the marginal note to which is not correct; and, having regard to the judgment of the Vice-Chancellor, commencing at page 18, and that Harriett I. A. Duckett left issue, the contract would have been capable of performance if, in the present case, it had been to give or leave a child's share to the said Harriett. But no difficulty such as arose in *Barkworth v. Young* arises here, as the contract in this case was, that the portion of the said Harriett should be paid to the petitioner; and the late Colonel Gordon might have made a will, leaving such portion to the petitioner, which, I apprehend, would have been a performance of the contract. I do not, therefore, think that the death of Harriett in the lifetime of her father rendered the contract or representation of

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(a) 7 Hare, 267.

(b) 4 Drew. 1.

1860.  
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the late Colonel Gordon, contained in the settlement, incapable of performance.

The next question which arises is, as to the manner the contract should be carried into effect, assuming that the construction which I put upon it be correct. If the contract of the late Colonel Gordon had been similar to the agreement in *Barkworth v. Young*, that he would, at his death, leave to his daughter an equal share of his property with his other children, or that his daughter should at his death have an equal share with his other children, according to the judgment of the Vice-Chancellor (p. 18), it could have been performed in two ways, if Harriett had survived her father, "either by bequeathing to his daughter by will an equal share, or by dying intestate, leaving his children to share equally under the Statute of Distributions;" and, in page 20, he states:—"Now here, it was manifestly the intention of the parties that, in one way or the other, the daughter should have an equal share of the testator's property." Any testamentary disposition which would have prevented the daughter taking an equal share of the testator's property would, according to what is laid down by *Lord St. Leonards*, have been a fraud on the agreement. Now if, in the case of *Barkworth v. Young*, the term used had been "child's share," instead of "equal share of his property with other children," I should have considered the meaning to be the same. If so, the contract in the present case being that the portion should be paid to the petitioner cannot vary the amount payable. The amount payable was, in my opinion, an equal share; that is (the late Colonel Gordon having had three children), one-third of his property; and, in calculating what that one-third would amount to, I think that the sums advanced to the two sons should be taken into consideration, and, being added to his assets, the petitioner would be entitled to such sum as would be equal to one-third. The two sons would not, of course, be bound to bring their shares into hotchpot, unless they claimed a part of the assets; but, as I understand the argument addressed to me, they deny that the will correctly states the sums advanced to them by the late Colonel Gordon in his lifetime; and they contend that, if the construction

which I put on the settlement be correct, they are entitled (bringing the sums so advanced into hotchpot) each to a child's share.

A question was raised by the petitioner, as to the two sons being charged with interest on the sums to be brought into hotchpot; but I am not aware of any case in which, where sums advanced are brought into hotchpot, interest has been charged. When I speak of money being brought into hotchpot, that expression is, strictly speaking, only applicable to cases under the Statute of Distributions.

I overlooked, during the argument, my attention not having been called to the fact, that the minor son of the petitioner, to whom £2000 was bequeathed by the late Colonel Gordon, had an interest adverse to that of the parties who appeared on the appeal, and had an interest in disputing the claim of the two sons of the late Colonel Gordon; and I sent in an order, shortly after the Court rose last Sittings, which recognised the claim of the two sons. I think that the minor ought to have been represented both in the Master's office and in this Court; and I accordingly afterwards put a stay on the order. The way in which the claim of the two sons, supposing the construction I put on the settlement to be correct, is sought to be established is this:—The contract, as I construe it, is, that the portion of Harriett I. A. Gordon was to be an equal share of the property of the late Colonel Gordon with his other children; and the two sons contend that this in effect was a contract by the late Colonel Gordon, that his personal property should be equally divided between all his children. This is a question, however, which Counsel for the minor should have been heard upon. The two sons were no parties to the settlement; and it might be argued that there was no contract with them, and no contract with the petitioner for their benefit; and, if there was, that neither the marriage consideration, nor any other consideration in the settlement, extended to them. Suppose that the petitioner had adopted the course of making no claim on foot of the covenant, leaving the assets to be applied to the payment of the legacy to the minor, could the sons of the late Colonel Gordon have filed a cause petition, claiming under the agreement in the settlement? Or, if the suit had been instituted in the

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—  
*Judgment.*

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*Rolls.*  
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name of the minor, to raise the amount of his legacy, and the petitioner had filed no charge in such suit on foot of the covenant, could the sons of the late Colonel Gordon have claimed under the covenant? If not, the question then arises, can the fact of the petitioner claiming under the covenant give rights to the two sons of the late Colonel Gordon to make a claim as creditors, and thus defeat the bequest to the minor?

I think that Counsel on both sides will, on consideration, see that the minor ought to have been represented in the suit, and that, if he is not represented, the decision of the Court would not be binding on him. I shall be willing to sanction any course which will lead to the least expense, provided there be a *bona fide* appearance, by Counsel of eminence, on the part of the minor. There is doubt on the point, which was not argued before me, the minor not having been represented. If such objection had been made on the part of the minor, it might, perhaps, have been contended that the covenant was substantially the same as the covenant in *Barkworth v. Young*; and that it was a contract with the petitioner, that his intended wife and her two brothers should each have a child's share, i. e., an equal share of Colonel Gordon's personal estate; and if so, and supposing that there was no objection to the claim of her two brothers, except the want of consideration, that, although a Court of Equity will not, upon a bill or cause petition filed by a volunteer, give him any assistance, yet, upon a bill or cause petition filed by any of the parties to the deed, from whom any valuable consideration moved, all the trusts will be carried into effect, even those in favour of volunteers. That was decided by Vice-Chancellor Bruce, in *Davenport v. Bishopp* (a), which decision was affirmed by Lord Cottenham, on appeal (b).

The question, however, is, whether I am justified in deciding this point, in the absence of the minor? The Master has declared, by his order, that the legacy to the minor, Charles Duckett, "has altogether failed of effect, by reason of there being no assets or property of the testator to answer the same." That was the result

(a) 2 Y. & C., C. C., 451.

(b) 1 Phillips, 668.

of the Master's construction of the contract; and the same result would, I believe, follow from the construction which I have put on the contract; but I am not quite sure of this. It is, no doubt, perfectly settled, as a general rule, that a pecuniary legatee is not a necessary or proper party to a bill or petition for an account of the personal estate, it being the duty of the executors to protect the estate against improper demands; but where, as in the present case, the interest of the minor is adverse to that of three of the executors (the petitioner and the two sons of the late Colonel Gordon, who are respondents, being executors of the will), I apprehend I should not finally dispose of the case, without the minor being, in some way, made a party to the proceedings: *The Marquis of Hertford v. Zichi* (a). I have, therefore, put a stay on the order. There ought, under the circumstances, have been a guardian *ad litem* appointed. As to the best mode of obviating this objection, it will be for Counsel to consider.

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It turned out that there would not be assets to pay any part of the legacy bequeathed to the minor, after providing for the petitioner's claim; and an order was accordingly agreed to by Counsel, in accordance with the judgment of the MASTER OF THE ROLLS, and the order of Master Litton was varied, and the funds were distributed.

(a) 9 Beav. 11.

\* NOTE.—Mr. Serjeant *Lawson* having been consulted, on behalf of the minor, gave the following opinion:—

"I have considered this case on behalf of the minor; and I am of opinion that the petitioner clearly has a demand against the assets of Colonel Gordon, as a creditor, by virtue of the contract contained in the marriage settlement of Mr. and Mrs. Duckett, and is entitled to have that demand satisfied out of the assets, before any legatee be paid. As against the demand of the petitioner, therefore, I think that the minor has no case. A pecuniary legatee has no remedy if a creditor sweeps away the assets, which would otherwise be applicable to pay his legacy. Nor can I see the least reason for doubting that the MASTER OF THE ROLLS has come to a right conclusion as to the nature and extent of the petitioner's demand. Whether the minor will be entitled to receive anything on foot of the £2000 legacy depends on the state of the assets. Now,



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*Rolls.*

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looking at the report, it appears that the general personal assets will be all required to make up the amount claimed by the petitioner. The £500 and £1000 mentioned in the will are specifically bequeathed, and the minor is not entitled to be paid out of them.

"If, after satisfying the demand of the petitioner, there were a residue, I should be of opinion that two-thirds of such residue would be applicable to pay the legacy to the minor, in preference to the claim of the sons as residuary legatees; for, I think that, though the contract in the marriage settlement was to give petitioner a child's share, there was no contract to give a like share to the other two children; for instance, if testator had, by his will, given Mr. Duckett a full third of all his property, and so performed the obligation, he might have disposed of the rest of his property as he thought fit. If the marriage settlement amounts to a contract to divide all his property equally amongst his children, as in *Jones v. Martin*, even this opinion would be wrong; but I do not think it can be held that the father, by his contract, intended to fetter himself as to the mode in which he might share his property with his other children."

"This is a point, however, which does not call for decision; there is no residue to give rise to the question; and I am, therefore, of opinion that no benefit can accrue to the minor from the legacy of £2000.

"JAMES A. LAWSON."

"27th of November 1860."

### BULFIN v. DUNNE.

*June 9.*

*Nov. 6.*

A deposit of title-deeds, to be delivered to a solicitor, for the purpose of preparing a legal mortgage to secure an antecedent debt and future advances, though there be no agreement in writing for a mortgage, constitutes a valid equitable mortgage.

THIS was a motion by way of appeal from a decretal order of Master Murphy, of the 9th of May 1860, by which he declared that the deposit of a lease of the Portobello Hotel, on the 8th of January 1859, constituted a valid equitable mortgage. The lease was given to the petitioner, and delivered to his solicitor by Peter Ryan, the lessee, for the purpose of preparing a deed of mortgage of the property, to secure a debt due to the petitioner, and further advances. A draft of the proposed mortgage was prepared and given to Peter Ryan, for his approval; but he retained it; and no mortgage was executed. No memorandum was given by Ryan when he gave the lease. The premises, being leasehold, were sold under a *fieri facias*, and conveyed by the Sheriff to the respondent,

Dunne. The petition prayed a foreclosure and sale. The Master to whom the matter had been referred, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850, by the order appealed from, ordered a sale, in pursuance of the prayer of the petition. The particular facts of the case are fully stated in the judgment.

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*Statement.*

Mr. *Brewster*, Mr. *F. W. Walsh* and Mr. *Hamill*, for the appeal.

The single proposition on which the Master's order is founded is, that a person who delivers his original title-deeds to the solicitor for the lender, for the purpose of preparing the legal mortgage, thereby mortgages his property. There was no agreement in this case for any particular mortgage. A debt was due; but there was no arrangement as to the time when it was to be paid; and, although a mortgage was contemplated, the terms of it had not been agreed on. The only express authority to support the Master's order is Lord Eldon's, in *Ex parte Bruce* (a); and that is a very short case. The facts are not fully stated in the report of the case; and it is opposed to Lord Eldon's own opinion expressed in *Ex parte Hooper* (b) and *Ex parte Pearse and Protheroe* (c). In *Edge v. Worthington* (d), the question did not arise. A legal mortgage had been executed; and there was no further advance to be made. In *Hockley v. Bantock* (e), in *Keys v. Williams* (f) and *James v. Rice* (g), there was an express agreement for an equitable mortgage, independently of the delivery of the title-deeds, for the purpose of preparing the legal mortgage. It is that express agreement which constitutes the equitable mortgage; and the deposit of the deeds is only evidence of the agreement: *Russel v. Russel* (h). If the deposit of the deeds may be referred to any other purpose—if they are not deposited expressly as a pledge for securing a particular sum, there is no equitable mortgage: *Branden v. Boles* (i); *Norris v. Wilkinson* (k); *Brisick v. Man-*

*Argument*

(a) 1 Rose, 374.

(c) 1 Buck, 525.

(e) 1 Russ. 144.

(g) 5 D., M. & G. 461.

(i) Prec. in Ch. 375.

(b) 1 Mer. 7.

(d) 1 Cox, 211.

(f) 3 Y. & Col., Exch., 62.

(h) 1 Br. C. C. 269.

(k) 12 Ves. 192.

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ners (a); *Ex parte Bulteel* (b); 5 *Jarman on Conveyancing*, p. 113; *Spooner v. Weyman* (c).

Mr. D. Sherlock and Mr. D. C. Heron, in support of the Master's order, relied on *Ex parte Bruce* (d), and were stopped by the Court.

#### THE MASTER OF THE ROLLS.

Nov. 6.  
Judgment.

This is a foreclosure petition, founded on an agreement for a mortgage and deposit of a lease, in the petition mentioned. The case having been referred to Master Murphy, under the 15th section of the statute, he made an order, which was signed on the 9th of May 1860, which order contained the following declaration:—"It is hereby decreed and declared that the agreement in the petition mentioned, and the deposit of the lease, bearing date the 4th of December 1856 (in the petition mentioned), upon the 8th day of January 1859, constitute a valid equitable mortgage for the sum due and owing to the petitioner at the time of the agreement of the 30th of December 1858, in the said petition mentioned, amounting to the sum of £635. 1s. 5d.; and declare the same a charge upon the said mortgaged premises accordingly." And then follows a declaration that the petitioner is entitled to the costs of the suit; and a sale of the Portobello Hotel (the property demised by the said lease) is directed, in default of payment of the sum due to the petitioner. The notice of appeal seeks the reversal of the said order, and that the petition may be dismissed.

The facts appear to be as follow:—By indenture of lease, bearing date the 4th of December 1856, the Grand Canal Company demised to Peter Ryan, his executors, administrators and assigns, the premises known as the Portobello Hotel, for a term of ninety-nine years, at the rent of £125. The lease was registered on the 27th of June 1857, but no question turns on that. Peter Ryan entered into the possession of the premises, and carried on the business of an hotel-keeper

(a) 9 Mod. 284.

(c) 20 Beav. 607.

(b) 9 Cox, 243.

(d) 1 Rose, 394.

therein. The petitioner was and is a wholesale grocer ; and from the time Peter Ryan commenced business in the hotel, the petitioner supplied him with groceries, wines and spirits, and other shop goods, to a large amount. In the month of December 1858, Peter Ryan was indebted to the petitioner in the sum of about £574, for goods sold and delivered by the petitioner to the said Peter Ryan. Peter Ryan applied to the petitioner to accommodate him with a further advance of money and goods, and the petitioner agreed to advance £229. 0s. 9d., which, together with the sum then due, would make up the sum of £800, on the terms proposed by Peter Ryan, that he would grant his interest in the hotel and premises at Portobello, and the furniture and fixtures therein, on mortgage to the petitioner. The petitioner agreed to said proposal, on the 30th of December 1858 ; and the petitioner, on the faith of said agreement, did, on that day, deliver goods to Peter Ryan, to the value of £24. 12s. 2d. Peter Ryan, afterwards, about the 7th of January 1859, called on the petitioner, upon the subject of the proposed loan, and stated that the tenant's part of the original lease of the 4th of December 1856, of the hotel premises, was then in the possession of Messrs. Henry Rooke and Sons, as the solicitors of the Grand Canal Company, the lessors named in said lease, and who claimed a lien thereon for the amount of £3. 17s. 4d., for the costs of registering the lease. The petitioner then handed to the said Peter Ryan the sum of £4, for the purpose of paying the said costs, and getting up the tenant's part of said lease, and then directed Peter Ryan to hand said lease to James Patrick Madden, the petitioner's solicitor, in order to enable the said James Patrick Madden to prepare the necessary mortgage, pursuant to the said agreement. Peter Ryan paid the Company's solicitor the said sum of £3. 17s. 4d., and, having got the said lease from the Company's solicitors, he handed it to the petitioner's solicitor, for the purpose of preparing a mortgage of the said premises, both as security for the debt then due, and as a security for the future advances, pursuant to said agreement with the petitioner ; and, at the same time, Peter Ryan gave James Patrick Madden the necessary information, in order to have the deed of mortgage prepared. James Patrick Madden wrote down, in the presence of Peter Ryan, the

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*Rolls.*  
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*Judgment.*

1860.  
*Rolls.*  
 BULFIN  
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*Judgment.*

heads of the mortgage, which were read over and approved of by said Peter Ryan. James Patrick Madden proceeded to draft the mortgage, and, while same was being prepared, the petitioner, on the 10th of January 1859, at the request of Peter Ryan, made a further advance to him of the sum of £31, which sum of £31 was part of the sum agreed to be advanced. James Patrick Madden had prepared the draft of the mortgage on the 10th of January 1859, and it was then lying in his office, but a blank was left at the end thereof for the schedule of furniture, Peter Ryan having undertaken to furnish such schedule. Peter Ryan, on or about the said 10th day of January 1859, called at the office of James Patrick Madden, and left with him a list of the furniture, which was to compose the schedule at the end of the said indenture of mortgage. On or about Tuesday the 11th of January 1859, Peter Ryan called at the office of James Patrick Madden, who handed to Peter Ryan the draft of the mortgage for his approval; Peter Ryan did not object to the draft, but took it away, and never returned same either to the petitioner or to James Patrick Madden; but the said draft was returned to the office of James Patrick Madden, on the 13th of May 1859, by James Sinnott, the solicitor for John Dunne and Patrick Beahan, trustees named in the marriage settlement of Peter Ryan, which settlement bears date the 4th of July 1854. The said John Dunne and Patrick Beahan, trustees of the said settlement, having revived a judgment executed to them by Peter Ryan, at the time of the execution of the marriage settlement, a *fiery facias* was issued thereon, on the 11th of January 1859, and the Sheriff of the city of Dublin seized thereunder the said hotel premises and the furniture. Cautionary notices were served, by the petitioner, on the Sheriff and on John Dunne and Patrick Beahan, stating his claim as equitable mortgagee. The sale by the Sheriff, under said writ, of the leasehold interest and term of years in said hotel premises at Portobello, took place on the 10th of March 1859, and the said John Dunne was declared the purchaser, for the sum of £40. An assignment of said premises was executed by the Sheriff, and by said John Dunne.

The question is, whether there was a valid equitable mortgage to the petitioner, of the Portobello Hotel? If there was, the

sale to the respondent John Dunne, under the *fieri facias*, is subject to the equitable mortgage, of which he had full notice. If there was no equitable mortgage, John Dunne, as purchaser under the execution, is entitled to dismiss the petition. It was decided by Lord Thurlow, in the case of *Russel v. Russel* (a), also reported in 1 *White & Tudor's Leading Cases*, that notwithstanding the Statute of Frauds, a mere deposit of title-deeds by a debtor, for the purpose of securing a sum of money, although there was no writing manifesting the purpose for which the deposit was made, gave his creditor, in whose hands they were placed, an interest in the land to which they related, so as to entitle him to file a bill for a sale. That decision, although disapproved of, has been constantly acted upon, and is regarded as a binding authority. Several of the cases subsequent to *Russel v. Russel* are collected in Messrs. *White & Tudor's* note to that case. It is, however, contended, on the part of the respondent, that the deposit in this case was for the purpose of preparing a legal mortgage, and that in such cases the deposit does not constitute a good equitable mortgage. There is a conflict of authority on the question, whether a deposit of title-deeds, for the purpose of preparing a legal mortgage, constitutes a good equitable mortgage? The several cases on the subject are collected by Messrs. *White & Tudor*, in the note to *Russel v. Russel*. With respect to the decision of Sir W. Grant, in *Norris v. Wilkinson*, the evidence, I think, clearly showed that the deeds were not lodged to secure the debt. That case, therefore, does not affect the question. In the cases, however, of *Branden v. Boles* (b), *Ex parte Bulkeel* (c), *Ex parte Hooper* (d), and *Ex parte Pearse and Protheroe* (e), it has been decided that where deeds are not deposited expressly as a pledge for securing a particular sum, but are delivered to a solicitor for the purpose of enabling him to prepare a security to be thereafter executed, the deposit does not constitute a good equitable mortgage. On the other hand, Lord Kenyon, in *Edge v. Worthington* (f),

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(a) 1 B. C. C. 269.

(c) 2 Cox, 243.

(e) 1 Buck, 525.

(b) Prec. in Ch. 375.

(d) 1 Mer. 7.

(f) 1 Cox, 211.

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 DUNNE.  
 Judgment.

held that an agreement to give a legal mortgage, with a deposit of the title-deeds, for the purpose of preparing the legal mortgage, constituted a valid equitable mortgage. Lord Eldon was of the same opinion, in *Ex parte Bruce* (a), where he observed that the principle of equitable mortgages was, that the deposit of the deeds was evidence of the agreement; but, if they were deposited for the express purpose of preparing the security of a legal mortgage, that was stronger than an implied intention. This case has been followed by Lord Gifford, M. R., in *Hockley v. Bantock* (b). In *Keys v. Williams* (c), Lord Abinger, in giving judgment, said that, "If it were necessary to decide the specific point, I should say that an agreement to grant a mortgage for money already advanced, and a deposit of deeds, for the purpose of preparing a mortgage, is in itself an equitable mortgage by deposit; but here the deposit was evidently made as a present security, as well as with a view of preparing a future mortgage." A sale was decreed in that case, in default of payment. Lord Eldon's opinions, in *Ex parte Hooper* (d), and *Ex parte Pearse and Protheroe* (e), cannot be reconciled with his decision in *Ex parte Bruce*; but, it will be observed, that neither the last-mentioned case, nor *Edge v. Worthington*, were cited in those cases. Messrs. *White & Tudor*, after referring to the case, state that, "Upon the whole, taking into consideration that *Branden v. Boles*, and *Brisick v. Manners*, were decided before *Russel v. Russel*, and that *Edge v. Worthington* was neither in print, nor noticed, when *Norris v. Wilkinson* was argued before Sir W. Grant, M. R., we may arrive at the conclusion that the balance of authority is in favour of the proposition that a delivery of deeds, for the purpose of preparing a legal mortgage, constitutes in fact a valid equitable mortgage."

I shall follow the decisions of *Edge v. Worthington*, *Ex parte Bruce*, *Hockley v. Bantock*, and the opinion of Lord Abinger, in *Keys v. Williams*, on the authority of which cases, I presume, the Master decided. The motion must be refused, with costs.

(a) 1 Rose, 374.

(b) 1 Russ. 141.

(c) 3 Y. & C., Ex. Cas., 62.

(d) 1 Mer. 7.

(e) 1 Buck, 527.

1860.  
Rolls.

GRAY v. ROBINSON.

Nov. 3, 5.  
1861.  
Jan. 28.

IN Hilary Term 1844, Hugh Gray recovered a judgment in the Court of Queen's Bench against Meredith Thompson and Charles Thompson, in the penal sum of £4400, conditioned to pay £2200 with interest at £5½ per cent. By his will, bearing date the 15th of August 1855, Hugh Gray bequeathed the sum secured by the judgment, in the following terms:—"And as regards one other bond passed to me by my nephews Meredith Thompson and Charles Thompson, on which judgments have been entered, I will and bequeath one-half of the interest due thereon at the time of my death, and thereafter to grow due thereon, to my said nephews Meredith and Charles Thompson; and the other half of the said interest I give and bequeath to my nephews Patrick Gray and John Gray during their natural life; and, after the death of my said two nephews, then I bequeath said bond debt and the principal sum thereby secured, to Hugh Gray, son of my nephew John Gray, and, if he die without lawful issue, then I give same to Hugh Gray's next brother; . . . . . and I appoint my said wife and Andrew Johnston, son of Doctor Johnston of Dromahare, my residuary legatees." Meredith Thompson had died in September 1850. The testator, Hugh Gray, died on the 13th of February 1856, and Charles Thompson died in September 1856. The present suit was brought for the administration of the assets of Hugh Gray; and a question arose before the Master as to the interest on the moiety of the said judgment debt bequeathed to Charles and Meredith Thompson, from the death of Charles Thompson until the death of the survivor of the four nephews, when the entire principal was bequeathed to Hugh Gray. The Master, by his order, which is stated at length in his Honor's judgment, decided that the residuary legatees were entitled to the interest during that period. Cecilia Thompson, the personal representative of Charles Thompson, moved,

A testator bequeathed one-half of the interest of a sum to A and B, and the other half to C and D during their natural life, and, after the death of A, B, C and D, he bequeathed the principal to E, and he appointed residuary legatees. A died, and then B, leaving C and D surviving.

*Held*, that no part of the principal or interest went to E during the life of C and D.

*Held also*, that the executrix of B, and not the residuary legatees, was entitled to the interest of one-half during the lives of C and D.

*Statement.*



1860.  
*Rolls.*  


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 GRAY  
 v.  
 ROBINSON.  


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*Statement.*

by way of appeal from the Master's order, that it might be varied, by declaring her entitled to a moiety of the interest of the judgment debt which should accrue during the lives of Patrick Gray and John Gray, and the interest due since the death of Charles Thompson. A notice of appeal was also served on behalf of Hugh Gray and John Gray junior, the sons of John Gray, claiming a moiety of the judgment debt, and interest on such moiety from the death of the said Charles Thompson.

*Argument.*

Mr. *Brewster* and Mr. *Ince*, for Cecilia Thompson, argued that there was a complete gift of the principal and interest, and that no intestacy as to any portion of it was contemplated by the testator. There was no gift by implication of the interest of the Thompsons' moiety to John Gray or Hugh Gray. The true construction of the will was, that the interest of that moiety was bequeathed indefinitely, or during the lives of the four nephews of the testator, and the life of the survivor of them. They cited *Jones v. Randall* (a); *Townly v. Bolton* (b); *Pearce v. Edmeades* (c); *Bignold v. Giles* (d).

Mr. *J. M'Mahon*, for John Gray jun. and Hugh Gray, argued that the will should be construed distributively to bequeath the sum to the Thompsons, and, on the death of the survivor of them, that moiety, with principal and interest, was to go over: *Kay v. Kay* (e); *Drew v. Kellick* (f); *Willis v. Douglas* (g); *Lainson v. Lainson* (h); *Swan v. Holmes* (i).

Mr. *Chatterton* and Mr. *Levinge*, in support of the order, cited *Swan v. Holmes* (h); *Bignold v. Giles* (l); *Lill v. Lill* (m); *M'Dermot v. Wallace* (n); *Windham v. Windham* (o); *Heath v. Perry* (p).

(a) Jac. & W. 100.

(c) 3 Y. & C., E. C., 246.

(e) 4 De G., M. & G. 73.

(g) 10 Beav. 47.

(i) 19 Beav. 471.

(l) *Ubi supra*.

(n) 5 Beav. 142.

(b) 1 M. & K. 148.

(d) 4 Dr. 343.

(f) 1 De G. & Sm. 266.

(h) 5 De G., M. & G. 574.

(k) 19 Beav. 476.

(m) 23 Beav. 446.

(o) 3 B. C. C. 57.

(p) 3 Atk. 101.

The MASTER OF THE ROLLS.

A motion has been made in this case, on behalf of Cecilia Thompson, by way of appeal from the order of J. J. Murphy, Esq., the Master in this matter, bearing date the 4th of February, and filed the 26th of June 1860. The notice of motion seeks that the said order may be set aside or varied, so far as it declares that Andrew C. Johnston, the residuary legatee in the will of Hugh Gray, is, during the lives of the petitioners, Patrick Gray and John Gray the elder, and the life of the survivor of them, entitled to a moiety of the interest on the judgment in the petition mentioned, obtained by the testator, Hugh Gray, against Meredith Thompson and Charles Thompson, and the arrears of the moiety of the interest which accrued on the said judgment, since the death of Charles Thompson; and the said notice seeks that it should be declared that the said Cecilia Thompson, as personal representative of the said Charles Thompson, is, according to the true construction of the said will, entitled, during the lives of the said Patrick Gray and John Gray the elder, and the life of the survivor of them, to the said moiety of the interest to accrue on the said judgment debt, and the arrears of said moiety which have accrued since the death of the said Charles Thompson. Another notice of motion, by way of appeal from the said order, has been served on the part of the minor petitioners, Hugh Gray and John Gray the younger, seeking to set aside the declaration in the Master's order, which I have already stated, and that, in lieu of said declaration, it may be declared that the petitioner Hugh Gray, upon the death of the said Charles Thompson, became absolutely entitled in possession, with an executory devise over to his brother, the petitioner John Gray the younger, in the event of the said Hugh Gray dying without issue, to the moiety of the judgment debt, together with the interest on the said moiety of the said judgment, which accrued since the death of the said Charles Thompson. It appears to me that this latter notice is untenable, for the reasons I shall hereinafter state. The question in the case, therefore, is, whether the motion of Cecilia Thompson is well founded? and that depends on the construction to be put on the will of Hugh Gray, deceased, which bears date the 15th of August 1855.

1861.

*Rolls.*

GRAY  
v.

ROBINSON.

Jan. 28.  
*Judgment.*

1861.  
*Rolls.*  
 GRAY  
*v.*  
 ROBINSON.  
*Judgment.*

The Master's order declares that Hugh Gray, the testator, was in his lifetime, and at the time of his decease, entitled, amongst other personal property, to a certain judgment obtained by the said testator Hugh Gray, against one Meredith Thompson and one Charles Thompson, in the Court of Queen's Bench, in Hilary Term 1844, in the penalty of £4400, conditioned to pay £2200, with interest at  $5\frac{1}{2}$  per cent. per annum. The order further declares, that the testator Hugh Gray died on the 13th of February 1856, and that probate of his will was granted to the respondents, Roger D. Robinson and the Rev. John Hamilton. That Meredith Thompson, in the will named, died in September 1850, in the testator's lifetime, and Charles Thompson died in September 1856, after the death of the testator; and the order then declares that, in the said events, and according to the true construction of the said will, the petitioners Patrick Gray and John Gray, the two nephews of the testator, are, under and by virtue of the bequest in the said will, "entitled, during their natural lives, to a moiety of the interest due, and to accrue due, on foot of the said judgment debt for £2200; and that, after the death of the said Patrick Gray and John Gray, the said Hugh Gray, son of the said John Gray, or, in the event of the said Hugh Gray dying without leaving lawful issue at the time of his death, his next brother, the petitioner John Gray, will be absolutely entitled to the said judgment debt, and the principal sum of £2200 thereby secured; and it was, by the said order, further adjudged and declared that Cecilia Thompson, the personal representative of the said Charles Thompson, is entitled to a moiety of the arrear of interest upon said judgment due at the time of the death of the said testator Hugh Gray; and also to a moiety of the said interest which accrued due from the death of the said testator Hugh Gray, up to the time of the death of the said Charles Thompson; and it is thereby further declared, that Andrew C. Johnston, the residuary legatee of said testator, is, during the natural lives of the petitioners Patrick Gray and John Gray, and of the survivor of them, entitled to the said moiety of the interest to accrue on the said judgment debt, and to the arrears of the moiety of the interest which have accrued due since the death of the said Charles Thompson. The testator,

Hugh Gray, deceased, by his will, bequeathed a certain bond therein mentioned, to his wife; and no question arises upon that bequest. The clause on which the question arises is as follows:—"And as regards one other bond, passed to me by my nephews Meredith Thompson and Charles Thompson, on which judgments have been entered, I will and bequeath one-half of the interest due thereon, at the time of my death, and thereafter to grow due thereon, to my said nephews Meredith Thompson and Charles Thompson; and the other half of the said interest I bequeath to my nephews Patrick Gray and John Gray, during their natural life;\* and after the death of my said four nephews, then I bequeath said bond debt, and the principal sum thereby secured, to Hugh Gray, son of my nephew John Gray; and if he die without lawful issue, then I give same to Hugh Gray's next brother." After several other devises and bequests, there is the following devise:—"And I appoint my said wife and Andrew Johnston, son of Doctor Johnston, formerly of Dromahare, my residuary legatees."

1861.  
*Rolls.*  
GRAY  
v.  
ROBINSON.  
*Judgment.*

It has not been stated, during the argument, whether the testator's wife is dead; but I presume, from the declaration in the Master's order in favour of Andrew Johnston, in the order called Andrew C. Johnston, that the testator's wife died in his lifetime; and no question has been raised or argued as to whether, if the residuary legatees are entitled, that Andrew C. Johnston, one of such residuary legatees, is, under the events which have happened, entitled. It is not necessary, from the view I take of the case, to inquire into the facts, or decide that question. With respect to the notice of appeal served on the part of the minors, Hugh Gray and John Gray the younger, it is, in my opinion, unsustainable, as the bequest of the principal of the bond and judgment to Hugh Gray, and, if he should die without lawful issue, to his next brother, the said John Gray the younger, was to take effect after the death of the testator's four nephews, in the will named—and two of the said nephews are still living—and it is clear that if the will is to be construed according to its plain language, that bequest has not taken effect, either in

\* *Sic.*

1861.

*Rolls.*

GRAY

v.

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*Judgment.*

the whole or in part. That motion will be, therefore, refused with costs.

The testator's nephews Patrick Gray and John Gray the elder do not allege that they are entitled by implication to the half of the interest on the said judgment bequeathed to Meredith Thompson and Charles Thompson, both of whom are dead, Meredith Thompson having died in the testator's lifetime, and Charles Thompson having survived the testator; and, therefore, the question is, whether the said half of the interest on the said judgment, bequeathed to Meredith Thompson and Charles Thompson, deceased, is now payable to the appellant Cecilia Thompson, as the personal representative of Charles Thompson, during the lifetime of Patrick Gray and John Gray the elder, the other nephews of the testator? or whether the said half of the interest is to be considered as having lapsed? and whether same is payable, as the Master has decided, to the residuary legatee, during the lifetime of Patrick Gray and John Gray the elder?

There are only three constructions of which the clause in question is capable; and in considering what is the true construction with respect to the interest on the judgment, and to whom payable, it is perfectly clear, in my opinion, that the principal was not payable under the clause bequeathing the principal, until the death of all the four nephews of the testator, viz., Meredith Thompson, Charles Thompson, Patrick Gray and John Gray. There can be but little doubt that the testator intended to dispose of the entire interest on the judgment until the principal became payable; and that when he bequeathed half of the interest to two of his nephews, and the other half of the interest to the other two nephews, he intended to dispose of the whole interest until the principal was payable, and did not intend, as the Master has held, that there should be an intestacy as to half of the interest. It is admitted, by all the Counsel, that there was no bequest by implication, to Patrick and John Gray, of the interest bequeathed to the Thompsons, who are dead; and Patrick and John Gray make no claim; and if they have no claim, the question is, what is the effect of the clause? Patrick and John Gray making no claim, there are only three possible constructions

to be put on the clause. The clause in question, leaving out what does not affect the construction, is in these words:—"I give and bequeath one-half of the interest due and to grow due on the judgment, to my nephews Meredith Thompson and Charles Thompson; and the other half of the said interest I give and bequeath to my nephews Patrick Gray and John Gray, 'during their natural life.'"

1861.  
Rolls.  
GRAY  
v.  
ROBINSON.  
Judgment.

The Master has decided that the words "during their natural life" are to be inserted by construction after the bequest to the Thompsons, as well as after the bequest to the Grays; and that you are to read the bequest of the one-half of the interest to the Thompsons as a bequest of the said one-half of the interest to them "during their natural life;" and that, as they are both dead, the residuary legatee must be entitled until the principal of the judgment is payable, *i. e.*, until the death of the remaining nephews of the testator, Patrick and John Gray. The objection to that construction is, that it requires the insertion of words in the clause contrary to the principle of construction decided in the House of Lords, in *Gray v. Pearson (a)*.

The next construction which may be put on the clause (which is one of those relied on by the appellant) is, that if you do not insert the words "during their natural life," which the Master has, by construction, inserted after the bequest to the Thompsons, there was an indefinite bequest of the one-half of the interest on the judgment to them, until the principal of the judgment was payable, *i. e.*, until the death of Patrick and John Gray; and in such case it is said, on the authority of *Bignold v. Giles (b)*, that the one-half of the said interest bequeathed to the Thompsons is payable to Cecilia Thompson, as the personal representative of Charles Thompson, who survived Meredith Thompson, during the lives of Patrick and John Gray.

The third construction which the clause is capable of, and which has been also relied on by the appellant's Counsel, is, that the words at the end of the clause in question, "during their natural life," which, of course, means "during their natural lives" (the sense in

(a) 6 H. of L. Cas. 61.

(b) 4 Drew. 343.

1861.  
*Rolls.*  
 GRAY  
*v.*  
 ROBINSON.  
 Judgment.

which the words are obviously used in another part of the will), override the whole of the clause; and that those words, according to their grammatical and natural construction, are to be read "during the natural lives of the said Meredith Thompson, Charles Thompson, Patrick Gray and John Gray;" and if so, that the effect of the clause is to bequeath one-half of the interest to Meredith Thompson and Charles Thompson, during their lives and the lives of Patrick Gray and John Gray; and the other one-half of the interest to Patrick Gray and John Gray, during their lives, and during the lives of Meredith Thompson and Charles Thompson. The effect of that construction, which appears to be the most natural construction of the language of the clause, is, that the whole of the interest of the judgment was disposed of until the principal of the judgment became payable under the bequest of such principal; and it is not at all probable, having regard to the grammatical construction of the clause, that the testator intended to leave a portion of the interest undisposed of before the principal was payable. If this be the true construction of the clause, which I think it is, Cecilia Thompson is entitled to the interest which she claims. If the construction which I have secondly stated be the true construction, she is equally entitled.

I have not been able, after a careful consideration of the will, to come to the conclusion which the Master has, that you are to insert the words "during their natural life," after the bequest to the Thompsons, which leads to an intestacy as to part of the interest; and, unless you insert those words, the Master was mistaken. I think the best way is to insert no words, but to construe the words as they stand in the will; and if that course be adopted, in accordance with the principle laid down in *Gray v. Pearson*, the construction to be put on the clause is that either secondly or thirdly before stated; and in either case the appellant is entitled. I shall declare her rights accordingly.

1860.  
Rolls.

WATSON *v.* FITZPATRICK.

BROWNE *v.* FITZPATRICK.

BROWNE *v.* COOTE.

June 21.  
Nov. 20.

THIS was a motion by way of appeal from an order of Master Lyle, made in these matters. The order and the nature of the suits, so far as they are material, are fully stated in his Honor's judgment. The question on the motion was shortly as follows:—Certain lands were sold in the second matter. Mary Browne, the petitioner in that matter, and Elizabeth Watson, who was a respondent in that matter, and petitioner in the first matter, were salvage creditors in equal priority. The Master, in allocating the funds, directed the costs of Mary Browne to be paid in the first instance, and the residue to be divided rateably between Mary Browne and Elizabeth Watson.

Where there are no incumbrances prior to his, a petitioner having the carriage of the suit is entitled to his costs out of a fund the produce of real estate, in the first instance, and in priority to the demands and the costs of creditors in equal priority with him.

*Taylor v. Gorman* (1 Dr. and W.) observed on.

*Argument.*

Mr. *F. W. Walsh*, on behalf of Elizabeth Watson, moved that the Master's order be varied; and that, in lieu thereof, the sum due to Mary Browne for principal, interest and costs, and the sum due to Elizabeth Watson for principal, interest and costs, should be paid rateably. He contended that the petitioner was only entitled to his costs according to his priority, on the authority of *Taylor v. Gorman* (a); *Nelson v. Brady* (b); *Gray v. Crawford* (c); *Smyth v. Murphy* (d).

Mr. *D. Sherlock* and Mr. *Beytagh*, in support of the Master's

(a) 1 Dr. & W. 235 n.

(b) 2 Dr. & War. 143; S. C., 4 Ir. Eq. Rep. 359.

(c) 1 Ir. Eq. Rep. 276.

(d) 10 Ir. Chan. Rep. 42.



1860.

Rolls.

WATSON

v.

FITZPATRICK.

Judgment.

order, cited *Wright v. Keily* (a); *Wedgwood v. Adams* (b); *Kelly v. Kelly* (c).

The MASTER OF THE ROLLS.

The petition in the second matter, of *Browne v. Fitzpatrick and others*, was filed to raise the amount of a salvage claim due to the said petitioner in respect of money advanced by the petitioner to preserve from eviction the interest in certain houses in Lower Mount-street. The petition was referred to A. Lyle, Esq., the Master in the cause, under the 15th section of the statute. The petitions in the other matters were also referred to the Master, under the same section. By a decretal order made in the second matter of *Browne v. Fitzpatrick and others*, by the Master, dated the 31st of December 1856, it was declared that there was a sum of £105. 12s. due to said petitioner, in respect of such salvage advances, and that said sum and interest were well charged on the estate of the respondents John Henry Fitzpatrick and Maria O'Farrell in the said houses; and it was thereby further ordered, that the said sum and interest should be paid to the said petitioner within three months, or, in default thereof, that the interest of the said respondents in the said houses should be sold for the payment of the petitioner's demand, and the costs of the suit, and the demands of any other incumbrancers as should come in and prove their demands; and the said petitioner was directed to insert advertisements for all parties having charges or incumbrances to come in and prove their demands. The said houses were sold, and Elizabeth Watson, the petitioner in the first matter, and one of the respondents in the second matter, having proved a demand in the second matter, of *Browne v. Fitzpatrick and others*, in respect of a sum paid for the redemption of the said houses, the Master, by an order made in the said second matter, dated the 31st of October 1859, declared that the said Elizabeth Watson was entitled to the sum of £215. 5s. 1d., in respect of the sum so paid for redemption; and said sum was, by the

(a) 23 Beav. 463.

(b) 8 Beav. 103.

(c) 1 Ir. Eq. Rep. 317.

said order, declared a charge on the said houses and premises, together with interest; and she was also declared entitled to the costs of the cause petition wherein she, the said Elizabeth Watson, was petitioner, and the said John Henry Fitzpatrick and others were respondents, "along with her said demand;" and Elizabeth Watson was directed by the said order to make it up at her own expense; and that the petitioner Mary Browne should have her costs of opposing the charge of Elizabeth Watson, as costs in the matter. An order was made, entitled in the first matter, of *Elizabeth Watson v. John Henry Fitzpatrick and others*, and in the said second matter, and in a certain supplemental matter of *Browne v. Coote and others*, bearing date the 18th of April 1860, whereby, after directing the Accountant-General, out of a sum of £500 standing to the credit of the second and third matters, to draw in favour of one Denis Bartley for £134. 4s. 6d. (upon which part of the order no question arises); and it was further ordered that the Accountant-General should, out of the sum of £365. 15s. 6d. (the residue of the said sum of £500), draw on the Bank of Ireland, in favour of the solicitor for the petitioner Mary Browne, for £232. 17s. 11d. for the taxed costs of Mary Browne in the three matters, and for the sum of £69. 10s. 4d., the certified post costs of the said petitioner Mary Browne, said sums making together £302. 8s. 3d.; and it was further ordered, that the Accountant-General should draw on the Bank of Ireland for the sum of £63. 7s. 3d. (being the residue of the said sum of £500), in favour of the said Mary Browne and Elizabeth Watson, rateably in proportion to the respective amounts of principal and interest due to the petitioner Mary Browne, and principal, interest and costs due to the petitioner Elizabeth Watson; that is to say, in favour of Mary Browne for the sum of £19. 0s. 7d., and in favour of the petitioner Elizabeth Watson for the sum of £44. 6s. 8d. The Master has not expressly found the priorities of the said Mary Browne and the said Elizabeth Watson; but it appears, from the latter part of the said order of the 18th of April 1860, that it was assumed they stood in equal priority, as the residue, after payment of the costs in the said order mentioned, was to be paid proportionally between them. I inquired from Counsel on what ground the Master held

1860.  
Rolls.  
WATSON  
v.  
FITZPATRICK.  
Judgment.

1860.

*Rolls.*

WATSON

v.

FITZPATRICK.

*Judgment.*

that the two demands stood in equal priority; and I was informed that, in consequence of some facts and letters not brought under my notice, it was agreed between Counsel on each side that the demands should be taken to be in equal priority. The question, therefore, is, whether, as the two incumbrances are to be considered as of equal priority, the Master was right in holding that Mary Browne, who had the carriage of the proceedings, is entitled to have her costs paid out of the fund in the first instance? It is the settled practice of the Court, that a plaintiff or petitioner in a suit for the sale of real estate only gets the costs of the suit in the same priority with his demand, except such costs as have been incurred for the benefit of the parties in the cause, such, for example, as the making out of title to real estate to be sold: *Peyton v. M'Dermott (a)*; *Nelson v. Brady (b)*. I have inspected the Registrar's book in *Taylor v. Gorman*, and I do not think that that case is correctly reported. I have not been referred to any case in which the question has arisen as to the costs of the suit, where the plaintiff or petitioner stands in equal priority with another incumbrancer. The rule established in *Peyton v. M'Dermott* and *Nelson v. Brady* was, I apprehend, adopted to prevent the very objectionable practice of filing bills on the part of a puisne incumbrancer, for the sole purpose of realising costs. The principle of allowing a petitioner under the Sheriffs Act, who was a puisne incumbrancer, to be paid his costs, in the first instance, out of the rents received, worked so badly, it being the practice for Irish usurers, whose names are so well known in this Court, to purchase up, at a very trifling sum, puisne judgments, which it was known the funds would never reach, for the sole purpose of realising costs, that the Legislature interfered, the matter having been, with other notorious abuses of the Court of Chancery in Ireland then existing, brought under the notice of a Committee of the House of Commons. I believe that the object of establishing the rule of practice in causes, as it is laid down in *Peyton v. M'Dermott* and *Nelson v. Brady*, and other cases, was to prevent the great abuse consequent on allowing a plaintiff to have his costs in the first instance,

(a) 1 Dr. &amp; Wal. 234.

(b) 2 Dr. &amp; War. 143.

although he knew the funds could not reach him. That principle, however, is not applicable where two incumbrancers stand in equal priority, and one of them files a bill, or a cause petition, for the sale of the real estate, the produce of which is to be applied to pay the demands of both incumbrancers. In the absence of any decision on the subject, I should not feel justified in reversing Master Lyle's decision on a doubtful question. There being no rule of practice on the subject, I apprehend the Master was entitled to exercise his discretion as to the costs; and, if he had any discretion, the appellant has no right to appeal from a decision as to costs.

In the absence of any established practice in the Court of Chancery, as to the priority of the costs of the suit, where a plaintiff or petitioner in a suit for the sale of real estate, or for the appointment of a receiver, stands in equal priority with another incumbrancer, I thought it right to apply to Mr. Carey, Secretary of the Landed Estates Court, as to the practice in that Court; and he has been so good as to send me the following statement in writing:—"The practice observed by the Judges of the Landed Estates Court, with reference to the costs of proceedings, is, to allow such costs in the same priority as the petitioner's demand, except in cases where, under the circumstances, the Judge makes an order *specially* declaring the petitioner entitled to his costs in any earlier priority. In cases of incumbrances of equal priority, the Court would allow the costs of the petitioner (being one of such incumbrancers), in priority to both. I have mentioned the subject to Judge Longfield, and he says that he recollects having had occasion to consider the question; and he found that the above course was consistent with the terms of some Chancery decrees; but he cannot now particularly refer to them."

I am not aware of the Chancery decrees referred to by Judge Longfield; but I concur in the view adopted by the Landed Estates Court and by Master Lyle; and, at all events, I do not feel justified in reversing Master Lyle's order on a question of costs, unless there was a clear rule of practice at variance with his decision. I am, therefore, of opinion that the motion must be refused, but without costs. A question might, perhaps, have been raised, upon which

1860.  
Rolls.  
WATSON  
v.  
FITZPATRICK.  
Judgment.

1860.

*Rolls.*WATSON  
v.

FITEPATRICK.

*Judgment.*

I offer no opinion, as it has not been argued, that Elizabeth Watson should (as well as Mary Browne) have been paid her costs out of the fund before the balance was rateably distributed.

*May 30.**June 2.**Nov. 3.*

## GRAY v. GRAY.

A testator bequeathed to his two sons all his property, real and personal, to have and to hold the same in the most absolute manner, and he declared it to be his will and intention that his sons should, at their discretion, and according to their own judgment, allocate to the other members of his family, being his lawfully begotten children, such portions of the said property and goods, be the same more or less, as to them should seem fit and suitable; and he appointed his said sons his executors.—*Held*, coupling the will with an admission in the petition by the sons, of the testator's intention, that a trust had been created, and that the sons were trustees for the other children of the testator as to the entire property of the testator, both real and personal.

THIS was a suit for the administration of the estate of John Gray. The principal question in the case was, whether a trust was created by the will, in favour of his children, and which of them? Master Brooke, to whom the matter was referred, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850, by his decretal order, declared that, having regard to the statements in the petition respecting the testator's intention, and to the expressions in the will, a trust had been created in favour of the children other than the two sons, the devisees. The petitioner, one of the sons, appealed from that declaration.

Mr. *Brewster* and Mr. *Lawless*, for the petitioner, contended that no trust was created by the will. The direction of the testator was neither imperative nor precatory: *Wood v. Cox* (a); the subject of the alleged trust was uncertain, and the objects of it were uncertain: *Williams v. Williams* (b); *Webb v. Wools* (c); *Knight v. Knight* (d); *Wheeler v. Smith* (e); *Biggs v. Ward* (f); *Meredith v. Heneage* (g); *Sugden's Law of Property*, p. 389; *Pinckard's*

(a) 2 M. &amp; C. 648.

(b) 1 Sim., N. S., 358.

(c) 2 Sim., N. S., 267.

(d) 3 Beav. 148.

(e) 6 Jur., N. S., 62.

(f) 1 Hare, 445.

(g) 1 Sim. 556.

*Trust* (a); *M'Auley v. Clarendon* (b). The trust was at most a partial one, as to such sum as the sons, in their discretion, should choose, and as to the residue the sons were beneficially interested: *Wood v. Cox* (c); *Dawson v. Clarke* (d).

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Argument.

Mr. *W. Bourke* and Mr. *W. R. C. Smith*, for one of the daughters of the testator, contended that there was a trust on the face of the will itself; but if the trust did not sufficiently appear on the face of the will itself, it was plain, by coupling it with the statement in the petition, by which it appeared that the sons were to hold on a secret trust: *Russell v. Jackson* (e); *Briggs v. Penny* (f); *Walgrave v. Tebbs* (g); *Bernard v. Minshull* (h).

Mr. *Lloyd* and Mr. *Coffey*, for Moses Wilson Gray, one of the trustees, declined to take any part of the property to himself, or to take any part in the discussion, as he considered that his father intended to create a trust.

Mr. *G. O. Malley*, for Alexander Gray, another son.

#### THE MASTER OF THE ROLLS.

In this case a motion has been made, on the part of the petitioner John Gray, by way of appeal from the decretal order of William Brooke, Esq., the Master in this matter, signed the 27th of April 1860. The appeal is from the portion of the decretal order which is in these words:—"Having regard to the statements in the petition in this matter set forth, respecting the said testator's intentions, and also to the expressions of the will itself, declare that a trust has been created, of which the trustees are the said petitioner John Gray and his brother Moses Wilson Gray, and the objects of the trusts are the other children of the said testator, and the subject-

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(a) 4 Jur., N. S., 1041.

(c) 2 M. & Cr. 684.

(e) 10 Hare, 204.

(g) 2 Jur., N. S., 83.

(b) 8 Ir. Chan. Rep. 121, 568.

(d) 18 Ves. 254.

(f) 3 M. & G. 546.

(h) 1 Johnst. 276.

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matter the entire property of the said testator, both real and personal."

It is sought, by the notice of motion, to set aside such declaration, "and that it may be declared that the petitioner and the respondent Moses Wilson Gray take the properties devised to them by the testator's will, unaffected by any trust, but with an absolute discretion and power in them to make such provision for the testator's children as they should think proper; or, if the Court shall be of opinion that a trust was created, that it may be declared that all the children of the testator, including the petitioner and the respondent Moses Wilson Gray, are entitled to the benefit thereof; and that the said order may be reversed and varied accordingly."

The will of the testator is short, and is in these words:—"I, John Gray, of Claremorris, in the county of Mayo, being infirm of body, but of sound mind and judgment, do hereby will and bequeath unto my sons, Moses Wilson Gray, Esq., Barrister-at-law, and John Gray, Esq., M.D., of Dublin, all the property, real, personal or otherwise, and all the stock and furniture, and every the goods and chattels, of whatever nature and kind soever, of which I may be seised and possessed at the time of my decease, to have and to hold the same in the most absolute manner; and I further will and hereby declare it to be my intention that the said Moses Wilson Gray and John Gray shall, at their discretion and according to their own judgment, allocate to the other members of my family, being my lawfully begotten children, such portions of the said property and goods, be the same more or less, as to them the said Moses Wilson Gray and John Gray shall seem fit and suitable; and I hereby appoint and nominate the said Moses Wilson Gray and the said John Gray as my executors; and I hereby make and publish this as my last will and testament, affixing thereto my hand and seal, the 27th of July 1852." The will was duly signed and attested, and probate thereof was granted to the petitioner John Gray, saving the right of the other executor, Moses Wilson Gray. The testator died in 1856, and the petitioner took the opinion of Mr. *Deasy*, now the *Attorney-General*, shortly after, and the respondent took the opinion of Mr. *Brewster* in 1859. The opinion of

those gentlemen was unfavourable to the petitioner, although they considered the question as one of great difficulty. I should be very slow to come to a conclusion at variance with the concurrent opinions of the Master, the *Attorney-General* and Mr. *Brewster*; but I must say that I concur substantially in their opinion.

The petitioner, in the petition, states, "That immediately after the interment of the testator, the petitioner caused his solicitor to prepare a case, to lay same before Counsel, for his advice and directions respecting said will and affairs; and said case, to which, to avoid prolixity, petitioner begs leave to refer, stated as accurately and fully as petitioner's knowledge of said affairs enabled him to instruct said solicitor, all the facts and circumstances connected therewith, with which he was acquainted; and also his views as to the manner and mode in which the trusts of said will should be executed, according to what petitioner understood and believed to be the wishes and intentions of the testator, more especially with respect to testator's son George Gray." The petitioner, at the time of verifying the petition, indorsed the case and opinion, which was, in effect, by reference incorporated therewith; and the petition prays, amongst other things, that the "trusts of the will may be carried into execution."

The case referred to by the petitioner in the petition, and incorporated by reference therewith, states, amongst other things, that, "In the month of July 1852, the testator was seized, and for some time confined, by a serious and an alarming illness. During this illness, and at a period when he was considered to be on the verge of death, he was visited by one of his sons, Dr. Gray, of Dublin (the petitioner), to whom he expressed his concern at not having, up to that time, made any will or settlement of his affairs. After some conversation on the subject, and speaking at once fully but generally as to how he would wish his property to be distributed amongst his children, he directed Dr. Gray to draw his will, devising and bequeathing all his property, of every kind whatsoever, to Mr. Wilson Gray (another of his sons), and Dr. Gray. It so happened that Mr. Wilson Gray, in whom testator placed great confidence, was not, at the time, in Claremorris, or within reach of being

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consulted ; but he afterwards became fully acquainted with same, and it is believed was the custodee of it for some time. This devise he, testator, wished and directed to be absolute in its terms, so as to vest in Mr. Wilson Gray and Dr. Gray uncontrollable discretion in the disposition and distribution of his property, trusting, however, to their probity, that they would dispose of it in consonance with what they knew to be his views and wishes in that respect. These views and these wishes he not only then, but after his recovery from that illness, expressed, and they may be thus conveyed:—And, first, as to the female portion of his family. He considered, as indeed the fact was, that he had more than provided for his daughter Mrs. Margaret M'Cullagh, and that his other two daughters should get about £500 each, which contemplated, in the case of his daughter Mrs. Rutledge, a sum of £200 in addition to the £300 given to her on her marriage. As to his sons, he intended that there should be secured for his eldest son George a life provision, to be so guarded as to deprive him of all power of either disposing of it or incumbering it—a restriction absolutely necessary for the protection of the said George, who is of such character and habits as to render some such restriction necessary for his own personal security. He was also understood to desire that the two sons in America, and his son Joseph, should get about £200 a-piece ; but it is to be observed that this last-named son, being rather of a wild and improvident turn, the testator was very anxious that great caution and circumspection should be used in his instance. In truth, it was perplexity as to how his wildness, and the weakness of George, could be dealt with, that had prevented the testator from settling the details of his affairs, and that induced him to prefer the mode of placing the matter within the power, and in the hands, of his two sons Mr. Wilson Gray and petitioner, in both of whom he placed implicit reliance. With respect to any surplus, it was to go equally between Mr. Wilson Gray and petitioner ; but it is very doubtful if there will be any surplus, and quite certain that, in any event, it will be very trifling. As already mentioned, the testator recovered from the illness in the course of which he had made said will ; and although the will itself remained in his hands, from its

date up to his death, he made no alteration or change; and the following indorsement, in testator's handwriting, appears on it, viz., 'The last will and testament of John Gray.'

The case then states the mode in which the petitioner proposed that the property of the testator should be distributed, under five heads, which would include an annuity of £60 a-year for one son, and sums amounting to £1300 or £1400, for other children; and as to the surplus, the words of the case are, "Sixthly; the surplus, *if any*, in equal shares to Mr. Wilson Gray and Dr. Gray," the petitioner.

Mr. *Deasy* stated his opinion at length to the several queries; and although he expressed a doubt on the question which now arises, his opinion was unfavourable to the claim now made by Dr. Gray, Mr. *Deasy* considering that Mr. Moses Wilson Gray and the petitioner took the property subject to a trust for distribution amongst the other members of the family. If the construction sought to be put on the will by the petitioner be well founded, he and Mr. Wilson Gray, his co-trustee, have an interest directly opposed to their duty. If they have an unrestricted power to appropriate any sums, however small, between the other children, and that they are entitled to the surplus, the effect would be, that the trustees might take a surplus consisting of the principal part of the property.

Mr. *Lloyd* appeared for the co-trustee, and makes no claim, considering that he and the petitioner held the property on trust for the other members of the family.

The first question is, whether any trust appears on the face of the will itself? It is contended, on the part of the petitioner, that the devise being to the petitioner and his co-trustee "in the most absolute manner," there was no trust. I think that argument is met by the case of *Bernard v. Minshull* (a); in which a devise to a person "absolutely" did not prevent his being considered a trustee, and excluded from any share of the property affected by the trust. It is not, however, necessary, as it appears to me, to decide whether there was a trust on the face of the will, as the facts stated in the case laid before Counsel, which was drawn up under the directions of the petitioner, and which case the petitioner incorporates by

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(a) 1 Johns. 276.

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reference in the petition, establishes that there was a trust; and the trust is, in my opinion, binding on the petitioner and his co-trustee. The co-trustee admits that it is binding. "If an estate is suffered to descend, the owner being informed by the heir that, if the estate is permitted to descend, he will make a provision for the mother, wife, or any other person, there is no doubt Equity would compel the heir to discover whether he did make such promise. So, if a father devises to the youngest son, who promises that, if the estate is devised to him, he will pay £10,000 to the eldest son, Equity would compel the former to discover whether that passed in parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of the £10,000." That was laid down by Lord Eldon, in *Strickland v. Aldridge* (a). Mr. Jarman, in his *Treatise on Wills*, 2nd ed., vol. 1, p. 343, states, "And it is clear that, in such a case, if the trust were denied by the heir or devisee, it might be proved *aliunde*."

In *Lewen on Trusts*, 3rd ed., p. 70, it is laid down, after referring to *Strickland v. Aldridge* :—"And so generally, if a testator devises an estate to A, the beneficial owner on the face of the will, but upon the understanding between the testator and A that the devisee will, as to a part, or even the entirety of the beneficial interest, hold upon any trust which is lawful in itself, in favour of B, the Court, at the instance of B, will affect the conscience of A, and decree him to execute the testator's intention." Many of the authorities in support of this proposition are referred to by Mr. *Lewen*; and it is not necessary to go through them, as I apprehend there is no doubt on the subject. The last case in which, I believe, the law is so laid down is *Russell v. Jackson* (b). If this be so, I cannot understand how it can be contended that there was no understanding between the testator and the petitioner, or that he and his co-trustee could, consistently with what is stated in the case drawn up for Counsel under the petitioner's directions, hold the property discharged of any trust. I am, therefore, of opinion that the first question raised by the notice of appeal, that the petitioner and his co-trustee take the property unaffected by any trust, is unsustain-

(a) 9 Ves. 519.

(b) 10 Hare, 212.

able. It is to be observed that the petition prays that the trusts of the will may be carried into execution.

The second question raised by the notice of appeal is that, if there was a trust, all the children of the testator, including the petitioner and the respondent, Moses Wilson Gray, are entitled to the benefit thereof. Now the notice of appeal does not define what the extent of the claim of the petitioner is. His co-trustee would not, as I understand, consent to any allocation of the property, except in accordance with the declared intentions of the testator; and, if not, how is the property to be divided? If it was divided in equal shares between all the children, including the petitioner and his co-trustee, this would, I apprehend, be at variance with the understanding which existed between the petitioner and the testator, as set out in the case. The case states that, "with respect to any surplus, it was to go equally between Mr. Wilson and Dr. Gray (the petitioner); but it is very doubtful whether there will be any surplus, and quite certain that in any event it will be very trifling;" *i. e.*, that, after carrying out the intentions of the testator, which, I think, it is plain there was an understanding should be carried out, if the property was devised to Mr. Wilson Gray and the petitioner, it was doubtful whether there would be any surplus, and, if any, that it would be very trifling. If so, the division of the property between all the children, including the petitioner and his co-trustee, would be directly at variance with the intention of the testator, as stated in the case. If the petitioner had sought that the Court should carry into effect what the petitioner considered to be the understanding which existed between him and his father, I could understand the petitioner alleging that there would be a surplus divisible between him and Moses Wilson Gray; but that is not the case made by the notice of appeal, or during the argument. The case made by the notice of appeal, and during the argument, was, "that the petitioner and the respondent, Moses Wilson Gray, take the proportions devised to them by the testator's will, unaffected by any trust, but with an absolute discretion and power in them to make such provision for the testator's children as they should think proper;" but that, if there was a trust, "all the

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children of the testator, including the petitioner and the respondent, Moses Wilson Gray, are entitled to the benefit thereof;" that is, that, although there should be no surplus after carrying out the understanding between the testator and the petitioner, the petitioner was to take an equal share of the property with the other children. A decision to that effect would not carry into effect the trust, but would be opposed to it. There is, however, a legal difficulty in the way of the petitioner claiming half of the surplus, or any portion of the testator's property. In *Briggs v. Penny* (a), Lord Truro laid down as follows:—"It is most important to observe that vagueness in the object will unquestionably furnish reason for holding that no trust was intended; yet this may be countervailed by other considerations which show that a trust was intended, while, at the same time, such trust is not sufficiently certain and definite to be valid and effectual; and it is not necessary, to exclude the legatee from a beneficial interest, that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Now this is precisely the case with the present bequest. I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires;' and the very expression of confidence that Miss Penny would make a good use and dispose of the property in a manner in accordance with the testatrix' designs and desires or intentions appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose; or, in other words to the same import, upon trust. It seems to me to be tantamount to a bequest upon trust; and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained—such trust be left undeclared; but still, in such case, it is clear a trust was intended; and that is sufficient to exclude the legatee from a beneficial interest. Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still, in all

(a) 3 M. & G. 556, 557.

these cases, as is well known, the legatee is excluded, and the next-of-kin take. But there is no peculiar effect in the word 'trust;' other expressions may be equally indicative of a fiduciary interest, though not equally apt or clear." In *Russell v. Jackson* (a), the Vice-Chancellor stated:—"It is clear that the devise was made to these defendants for the purpose of holding it upon trust; and, being held by them upon trust, the result, as I conceive, is, that they cannot take beneficially, in any view of the case." Of course, if a testator shows an intention that a trustee should take beneficially, he may do so; but, in the absence of such intention, a devise on trust excludes the trustee from claiming to take beneficially. In the case of *Bernard v. Minshull* (b), Vice-Chancellor Wood says:—"Suppose that, by the precatory words in a will, the donee is requested to apply property, the amount of which is ascertained, 'for the benefit of —,' or 'for the benefit of the person I have named in a paper that will be found in such a drawer,' and there is no such paper found, in either case there would be uncertainty enough as to the object; and yet such a trust would be created as would effectually exclude the donee from applying the property to his own use."

*Dawson v. Clarke* (c) was referred to by the petitioner's Counsel; but that case has been overruled, as also the decision of Vice-Chancellor Bruce, in *Russell v. Clowes*, and of the Vice-Chancellor of England, in *Mapp v. Elcock*. The cases on the point decided in *Dawson v. Clarke* are collected in *Read v. Steadman* (d), which is an important case on this subject. Assuming, however, that the Court could not in general carry into execution a trust where so complete a discretion was vested in the trustees as in the present case, as to the mode of distribution, yet in such case the Court, in the event of the trustees not concurring in the exercise of the discretion vested in them, would divide the fund between the other children who were objects of the trust. The petition does not make the case that there was an intestacy as to the beneficial interest in the property devised on trust to the petitioner and Moses Wilson Gray, and that the petitioner is entitled, as one

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(a) 10 Hare, 214.

(b) 1 John. 286, 287.

(c) 15 Ves. 409.

(d) 26 Beav. 500.

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of the next-of-kin, to an equal share. The petition prays that the trusts of the will may be carried into execution. If the petitioner had by his petition contended that, in the event of the discretionary power not being exercised by the petitioner and his co-trustee, there would be an intestacy, the answer to such a case would have been that, although where a discretionary power is given to trustees, the Court has in general no jurisdiction to control them in the exercise of that discretion, provided their conduct be *bona fide*, and not influenced by improper motives, yet the Court will interfere where the discretion of the trustees is infected by misbehaviour, or they decline to undertake the duty of exercising their discretion. The cases on this subject are very numerous, and are collected in Mr. *Lewin's* treatise on the *Law of Trusts*, 3rd ed., pp. 538 and 543.

If the petitioner was to contend that the non-exercise of the discretion vested in the trustees in this case was to create an intestacy as to the beneficial and equitable interest in the property of which the legal title was vested in them, I apprehend that a Court of Equity would not permit the petitioner to derive a benefit to arise from his not executing the trust reposed in him in conjunction with his co-trustee, and would not allow him to claim as one of the next-of-kin, on an intestacy arising out of his own act. I think, therefore, the Master was justified in holding that the other children of the testator (exclusive of the trustees) are entitled to the entire property, the trusts not having been exercised. I sent in the order, shortly after the Court rose last Term, refusing the motion; but I have thought that the parties might wish to know the grounds of my decision.

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1861.  
L. E. Court.

**Landed Estates Court.**

In the Matter of the Estate of  
**WILHELMINA HAMMERSLY, Owner and Petitioner.**

Jan. 17.

THE subject of this case was a settlement made on the marriage of Richard Hammersly and Wilhelmina Sadlier, and dated the 30th of April 1808. The facts of the case and the passages which were the subject of criticism will be found at large in the judgment. The question arose on objection to the draft schedule of incumbrances.

Mr. Warren (with him Mr. E. M. Kelly and Mr. Flanagan), in support of the schedule, cited *Jones v. Kearney* (a); *Mornington v. Keane* (b); *Holliday v. Dorrton* (c); *Barron v. Barron* (d);

Mr. Hemphill, Mr. Roper and Mr. F. White, in support of objections to the schedule, cited *White v. Anderson* (e); *Metcalfe*

A marriage settlement vests freehold leases in trustees, "to hold to the use of the said A and his heirs and assigns, from the perfection of these presents, for and during the term of his natural life, without impeachment of waste," with a power to lease, remainder to said trustees to preserve, and from the decease of A, to secure a

jointure of £80 to B (A's wife). Then follows a covenant by A, charging the jointure on after-acquired estate, with power of distress; and further, that said lands, after the decease of the survivor of A and B, in case there should be but one child of said marriage, to the use of such only child, and the heirs of his or her body lawfully issuing; and in case there should be more than one such child, then to such children in such shares and proportions as the said A shall by deed or will appoint; and in default of such appointment, then to the use of all the children, as tenants in common, share and share alike."—*Held*, that the words "and his heirs" should be rejected, and that A takes a life estate.

That the clause beginning "and further" is a limitation in continuation of, and direct sequence upon, the limitations to trustees to preserve.

*Semble*—That if that clause be a covenant to settle after-acquired property on the children, a Court of Equity would not mould the trusts in any manner, as they are fully declared.

*Semble*—That, assuming it to be such a covenant, after-acquired property, settled, irrespective of such covenant, by A on a child, must be brought into hotchpot.

(a) 1 Dr. & W. 134.

(b) 2 De. G. & Sm. (judgt.) 318.

(c) 15 Beav. 480.

(d) 8 Ir. Chan. Rep. 366.

(e) 1 Ir. Chan. Rep. 419.



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In re  
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v. *Archbishop of York* (a); *Moore v. Cleghorn* (b); *Barlow v. Osborne* (c); *Bushell v. Bushell* (d); *Prachey on Settlements*, p. 524.

HARGREAVE, J.

This case comes before me upon the objections of Mr. and Mrs. Sargent and of Mr. Smith to the draft schedule. The subject-matter of the objections is the surplus fund arising from the sale of the lands sold in this matter, after payment of the charges. The draft schedule proposes to deal with this fund according to certain appointments made by Wilhelmina Hammersly, under a power contained in her late husband's will, by which appointments she has divided the fund in unequal shares among certain of her children. The objectants contend that no such power of appointment exists, inasmuch as they allege that this property is bound in Equity by the provisions of a certain deed of the 20th of April 1808, under which the children take the property equally, in default of any appointment by Richard Hammersly himself, the deceased husband of the owner.

These objections are resisted on these grounds:—first; that the property is not affected in the manner suggested by the deed of 1808. Secondly; that even if it be so affected, the children are entitled under that deed to life estates only (a view which would partially defeat the objection of Mr. and Mrs. Sargent, and would totally defeat that of Mr. Smith); and that, thirdly, Sargent and wife have already obtained a provision from Richard Hammersly by a conveyance of another estate, and that they must either be content with that provision, or bring it into hotchpot.

The estates sold in this matter were acquired by Richard Hammersly after the execution of the deed of 1808, which was the settlement made on his marriage with Wilhelmina Hammersly; and the first question is, whether that deed contains a covenant by Richard Hammersly to settle all his after-acquired estates? The question turns entirely on the construction of the deed, each clause

(a) 1 M. & Cr. 556.

(b) 10 Beav. 423.

(c) 6 H. of L. Cas. 575.

(d) 1 Sch. & Lef. 90.

of which is conceived in technical language, but whose clauses are put together in a singularly inartificial manner. Its construction, therefore, requires a close consideration of the whole deed taken together, and a critical examination of its several clauses and of their grammatical and logical connection *inter se*. In construing such a deed, it is idle to speculate on the probable motives of the parties, or on the consequences flowing from any particular construction of the deed. The property which Richard Hammersly had at the time, and which was actually dealt with by the deed, consisted of leaseholds for lives only; and it is suggested as improbable that the lady and her friends would be content with a settlement of property of this temporary character; on the other hand, it is suggested to be at least as improbable that Richard Hammersly would bind himself to settle all his after-acquired estates indiscriminately, thus precluding himself from ever purchasing land, except for the purposes of the settlement, and rendering it impossible for him to provide for a future wife and his family by any future marriage. On this, I can only observe that there is no intrinsic absurdity in either of these two classes of settlement, and that it is simply the duty of the Court to ascertain which of the two was intended, by construing the deed and giving effect to its provisions according to the rules of the law. The deed is made between Richard Hammersly, of the first part, Richard Sadlier and his daughter Wilhelmina (now Mrs. Hammersly), of the second part, and Philip Corbett and William Sadlier, of the third part. It recites the intended marriage; it then recites, fully and in technical language, three leases for lives, of various townlands in the county of Tipperary, made to John Hammersly, and that Richard had become entitled to these lands, with a certain exception, under the will of his deceased father. The deed then witnesses that, in pursuance of the said marriage agreement (which must mean the recited agreement for the marriage), and in consideration of the marriage, and of the lady's fortune of £1000, and in order to make a provision for the said Wilhelmina, by way of jointure, and in lieu of dower, and also as a provision for the issue of the marriage, in manner thereafter expressed, Richard Hammersly grants and assigns unto Corbett and Sadlier, their heirs and assigns, all that and those the town and lands (describing them

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at length) comprised in the leases, to hold to them, their heirs and assigns, for the lives in the leases, to such uses, upon such trusts, and to and for such intents and purposes, and under and subject to such provisoes, limitations and agreements as are thereafter expressed and declared, of and concerning same; and, subject to the head-rents payable thereout, to the use of the said Richard Hammersly, and his heirs and assigns, from the perfection of these presents, for and during the term of his natural life, without impeachment of waste, with a proviso and declaration authorising him, during his life, to make leases, so as not to diminish the existing profit-rent; and after the determination of that estate, then to the use of Corbett and Sadlier, and their heirs, during the life of the said Richard Hammersly, upon trust to support and preserve the contingent uses and estates thereafter limited from being defeated and destroyed; and immediately after the decease of the said Richard Hammersly, to the use of the said Wilhelmina Hammersly, to receive thereout the yearly sum or jointure of £80 sterling, by equal half-yearly payments, for the term of her natural life, with power to enter into said lands to distrain. The deed then proceeds in the following language:—

“And the said Richard Hammersly, in consideration of the said intended marriage, and of the said sum of £1000, so secured, to be paid as aforesaid, the portion of the said Wilhelmina, hereinbefore mentioned, for himself, his heirs, executors and administrators, doth covenant, promise and agree, to and with the said Philip Corbett and William Sadlier, their executors and administrators, that he the said Richard Hammersly, by these presents, doth charge and incumber all and singular and every the several and respective estates, towns, lands, holdings, tenements, hereditaments and premises, wheresoever situate, whereof the said Richard Hammersly is now seised or possessed or entitled to, and which he shall, at any time hereafter, become seised, possessed of or entitled unto, to the payment of the jointure of £80 a-year, as aforesaid, to the said Wilhelmina, his intended wife, and with the like power of distress for recovery thereof as hereinbefore mentioned. And further, that the said lands, after the decease of the survivor of them the said Richard Hammersly and Wilhelmina Sadlier, in case there should be but one child of said intended marriage, to the use of such only child, and the heirs of his or her body lawfully issuing; and, in case there should be more than one such child, then to such children, in such shares and proportions as the said Richard Hammersly shall, by deed or will, appoint; and, in default of such appointment, then to the use of all the children, as tenants in common, share and share alike; and, if there should be no children, then to the right heirs of the said Richard Hammersly, subject to the conditions aforesaid.”

The deed contains nothing further material to the issue. It commences then a new operative part, in the nature of a covenant and

agreement, settling the wife's fortune of £1000, and closes with a covenant by Richard Hammersly for further assurance, in general terms, and usual trustee clauses. The question is, whether the words, "and further, that said lands, after the decease of the survivor, in case there should be but one child, to the use of such only child, and the heirs of his or her body," &c., are to be read in continuation of the limitation of uses, treating the previous words merely as a covenant by Richard Hammersly to give further security for the jointure out of all his other and after-acquired property, or whether they are a continuation of the covenant? In the former case, they apply only to the lands actually conveyed; and, in the latter case, they apply to all the settlor's estates, existing or future, and import a covenant to settle them on the issue.

In the first place, and in support of the latter view, it is contended that the lands conveyed by the deed are not, in fact, thereby put in settlement at all, inasmuch as the first limitation gives the absolute interest to Richard Hammersly; and that the words purporting to give him a life estate, and also the subsequent limitation to trustees, for his life, are void. I am unable to concur in that view. I can quite understand that, in construing a limitation to a man, and his heirs, for his life, the Court would prefer to reject the words "for his life," rather than the words "and his heirs;" but where this limitation is followed up by remainders, to take effect on his decease, and is accompanied by a power of leasing, it appears to me that the Court ought to support these limitations, by rejecting the words "and his heirs," which are thus clearly shown to be introduced by mistake. Where the Court must reject either the words limiting the fee, or the words limiting a life estate, it will reject the former, if the other limitations clearly show that a life estate was intended. If this be so, we have a limitation to Richard Hammersly for life, with a leasing power, then a limitation to trustees, for Richard's life, to support the contingent remainders thereafter limited, and then a legal jointure, with power of distress. We are then led to the inquiry, where are these contingent remainders, for the support of which this provision is inserted, to be found? The only part of the deed in which they can be found is in the clause now under consideration. It is indisputable that, if these legal con-

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tingent remainders are not the limitations to the children, contained in that clause, they have no existence; and construing this deed so as to give effect to all its clauses, and so as to make one part of it consistent with another, I cannot do otherwise than hold that the limitation of uses to children, which I have read, are the very contingent uses and estates which are to be supported and preserved by the limitations to trustees during Richard Hammersly's life.

The question still remains, whether these words may not perform the double function of limiting the legal contingent remainders in the estate dealt with, and, at the same time, declaring the uses to which the other and after-acquired property is to be conveyed? I am disposed to think that this view is not grammatically or logically possible. In order that they may perform the latter function, it is essential that they must be read and construed as part of the covenant of Richard Hammersly with Corbett and Sadleir; and they would thus be completely separated, in grammatical construction, from that part of the deed which contains the limitations of uses. I am, therefore, of opinion that, upon a comprehensive view of the whole of the deed taken together, the limitations to the children are limitations of legal contingent remainders, in continuation of and in direct sequence upon the limitations to trustees to preserve those remainders; and that the covenant is inserted, at the close of the limitation of the jointure, merely for the purpose of better securing that jointure, and is to be read as a parenthetical tack or addition to the jointure.

If we pass from the general structure of the deed to a minute criticism of its language, considerations may be found both adverse to, and in support of, this view. The covenant, taken by itself, can undoubtedly be read as a covenant that Richard Hammersly doth incumber all present and future estates with the jointure of £80 a-year; and further, that said lands shall go to the use, &c.; and in order to do this, it is only necessary to supply the verb "shall go," or "shall enure," or "shall stand limited;" and, if the covenant stood by itself, the Court would make no difficulty in supplying such words. The want of this verb, however, is, perhaps, not altogether without signification; because, undoubtedly, if these words are a mere continuation of the limitation of the uses, no verb is required,

as it then becomes only one of a string of uses which have been already aptly commenced in the *habendum* of the deed; and, indeed, if it were not for the introduction of the word "that" after "further," I think no grammatical difficulty would have existed. Again, the use of the words "said lands" merely, in the limitation to the children, has been referred to as indicating a reference to the lands specifically described and conveyed by the deed, rather than to the existing and future property of the settlor, which, when mentioned, is described as estates, towns, lands, holdings, tenements, hereditaments and premises. I do not attach much importance, in this case, to these minute considerations, though I will not say that they are wholly without weight; I prefer to base my opinion on the general scope of the deed.

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On this question I will just make this further observation:—I have expressed an opinion that the legal effect of the limitations is to give an estate to Richard Hammersly, for life, with power of leasing, with remainder to trustees, for his life, to support contingent remainders; but, on the principal question, I should have arrived at the same conclusion, even if I had felt myself obliged to hold that the estate was limited to Richard Hammersly in fee, and that the subsequent limitations were void. The considerations upon which I have based my conclusion do not depend upon *the effect* of the limitations of the lands conveyed, or even on the question whether those limitations have any legal effect at all or not, but simply on the fact that such limitations are in terms expressed in the deed.

The view which I take on this first question disposes of the objections, and renders it unnecessary to consider the other points; but, as the point which I have decided is not free from doubt, and as the other questions were discussed, I will shortly state my opinion upon them. Assuming that there is a covenant to settle all other and after-acquired property of the settlor, I am of opinion that it would be satisfied by a conveyance of such property to the uses mentioned in the deed, stating the uses in the identical words used in the deed; and that a Court of Equity could not and would not mould those limitations in any manner. Although the trusts are

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not executed, yet they are fully declared, and could not be added to or altered, by adding words of limitation, or cross remainders between the children, or provisions for maintenance, or any other usual clauses. But I think that the words would be sufficient to pass to the children the absolute interest in freehold leases, and that such interest would pass to the executors of a deceased child, under the statute abolishing general occupancy.

On the remaining question I find, on reference to the deed settling Ballyhane on Mr. and Mrs. Sargent, that it does not purport to be made in execution of any supposed power vested in Richard Hammersly, under the settlement or otherwise; and that, in fact, it is an ordinary conveyance or settlement made by an owner in fee. I must regard this as a satisfaction, *pro tanto* at least, of the covenant, in so far as Mrs. Sargent has a beneficial interest in such covenant; and that, if she filed a bill for specific performance of the covenant, she would fail, if the property conveyed to her, or settled with her consent, was equal in value to her aliquot share of the settlor's real estate; and that if it was of smaller value she could only recover the balance; or, in other words, that she would be obliged to bring this provision into hotchpot.

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In the Matter of the Estate of the  
 Assignees of JOHN SALLERY, *Owners and Petitioners.*

*Feb. 20.*

A, by his will, **THE** facts of this case, which was unsupported by authority on either dated 29th of May 1839, be- side, appear in the judgment. queathed to his illegitimate son, R. S., certain leaseholds, and, if the said R. S. should die without "heirs or issue," over.—*Held*, that as the 29th section of the Wills Act is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body;" and, therefore ("without heirs," in the said will, meaning "without heirs of the body," R. S. being illegitimate), the will did not confer the absolute interest on R. S., with an executory devise over in the case of his dying without issue living at his death, but an estate tail, and, the property being leasehold, the absolute interest.

Mr. *Henry Fitzgibbon* and Mr. *J. Vereker* appeared for the several parties.

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DOBBS, J.

This case would have been perfectly free from doubt, were it not for the 29th section of the Wills Act, 1 Vic., c. 26. Robert Sallery, senior, by his will, bearing date the 20th of May 1839, amongst other things, bequeathed to his illegitimate son, Robert Sallery, all the part of his holding of the lands of Sandymount, containing fifty-four acres, at the yearly rent of thirteen shillings per acre; and the testator ordered that if the said Robert Sallery should die without heirs, or issue, the said lands of Sandymount should revert to the testator's brother, John Sallery, his heirs, executors, administrators and assigns. Now there is no doubt that if this will were to be construed by the law as it stood before the late Act, Robert Sallery being illegitimate, the word "heirs" must be taken to mean "heirs of the body;" and therefore the words "without heirs or issue" would have been held to mean an indefinite failure of issue, and the effect of those words would have been to create an estate tail in freehold lands, and an absolute interest in chattel lands, in Robert Sallery, the devisee. But the old law has been changed by the 29th section of the Wills Act, which enacts, "That in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death, of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will." Now if this section applies to the present case, Robert Sallery does not take absolutely; but there is an executory devise over to John Sallery, in the event of Robert Sallery not leaving issue living at his death. The legal meaning of the phrase "without issue," under the old law, was opposed to the popular one, according to which it signified "without children;" and, therefore, by the Wills Act of 1837, a change was introduced, the effect of which



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was to make the legal meaning conformable with the popular one, as being present to the minds of most testators. But the change in the law is, by the words of the Act, confined to the construction of the words "die without issue," and the like words, and does not, in terms, apply to the construction of words which import dying without heirs of the body; it being a clear principle of construction that "*expressio unius est exclusio alterius*;" and there not being the same reason for a change of construction where the words "heirs of the body" are used, as where the word "issue" is used, I am of opinion that the words "die without heirs of the body," and similar expressions, are not within the meaning of the section, and therefore are to be construed as they were before the Act passed. I have been unable to find any authority on this point; but, for the reasons I have mentioned, it appears to me to be quite clear, that the intention of the Legislature was to confine the change of construction to the cases in which the word "issue" is used by testators. It is a well known principle of construction, that effect should be given, if possible, to every word of a will. Now the words in this will are not only "without issue," but "without heirs or issue;" I must, therefore, if I can, give effect to both words. The testator has shown throughout the will that he perfectly understood the meaning of the word heir; he has used it several times, but never otherwise than in its strictly legal sense as a word of limitation. Robert Sallery's estate, therefore, does not go over until he dies without heirs of his body; the effect of which would be to give him an estate tail in freehold lands; and the property here being a chattel real, he takes the absolute interest therein.

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**Court of Appeal in Chancery.**

**PHILIP CHARLES NEWTON, *Plaintiff*;**  
**PHILIP JOCELYN NEWTON, HENRY NEWTON,**  
**ARTHUR FITZMAURICE and**  
**BEAUCHAMP FREDERICK BAGENAL, *Defendants*;**  
**THOMASINE JANE ROBERTS, *Intervenant*.**

*Nov. 5, 6, 9.*

THIS cause came before the Court on a petition presented by the defendant Philip Jocelyn Newton, heir-at-law of John Newton, by which this defendant sought to reverse an order of the Judge of the Court of Probate, directing certain issues to be tried by a special jury before the Court of Probate itself. The following were the material facts appearing on the petition:—The said John Newton was, at the time of his death, seised in fee-simple of certain lands in the county of Carlow, and died in October 1859. Before 1858, John Newton duly executed several testamentary instruments; among others, a will dated the 16th of September 1850; another dated the 23rd of February 1852; another dated the 29th of December 1852; a codicil dated the 6th of October 1853; another dated the 3rd of December 1854; and a third dated the 17th of October 1854. From the time of their execution these documents remained in the custody of various parties, until after the death of the said John Newton. John Newton duly made another will, dated the 4th of February 1858, and thereby revoked all former wills by him made, and thereby devised all his real property to William Forbes Johnson and his heirs, upon trust, out of the rents and profits thereof, to pay yearly unto Miss Thomasine Jane Roberts, the intervenient, an annuity of £100 a-year. Then he directed the trustee, by sale or mortgage, to raise the sum of £500 for Beauchamp Newton Johnson, son of Charles Fraser Johnson, solicitor; then, subject to the annuity

Where the Judge of the Court of Probate directs issues respecting testamentary papers, the Court of Appeal will not vary his order, merely on the ground that the issues directed do not exclude all consideration of questions of law.

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and bequest, he devised his said estates to the use of the children of his marriage, as tenants in common in fee, and, in default of such issue, to the use of Philip Charles Newton, the plaintiff, for life, with remainder to his first and other sons in tail male, with remainder to his issue female, as therein mentioned, remainder to his own right heirs; and the said testator thereby provided for payment of his simple contract debts, and payment of funeral and testamentary expenses, out of two policies of insurance for £1000 each; and also directed that the residue after those payments should be handed to his said nephew, Philip Charles Newton, to whom testator thereby bequeathed such residue. The testator then bequeathed the residue of his property, real and personal, upon trust, for the person or persons who under his will might, at the expiration of ten months from the day of his death, be entitled to the lands thereinbefore devised. The will was prepared in Dublin by said C. F. Johnson, a solicitor, and was executed by the said John Newton on the day on which it bears date. Immediately upon its execution, the said John Newton took the will into his own possession; and, though search was made for it after the death of the said John Newton, it was not forthcoming; but a document purporting to be a copy or the original draft of the said will was retained by said C. F. Johnson, and lodged in the Court of Probate.

John Newton made and published another will, dated the 24th of April 1858, thereby revoking all former wills theretofore made by him; and thereby, after a bequest to his wife for life, he bequeathed all his other property, real and personal, to P. C. Newton, the plaintiff, his heirs and assigns, for ever, and nominated the said plaintiff his residuary legatee, and Arthur Fitzmaurice to be executor. The last-mentioned will was prepared by Charles Thorp, a solicitor, was executed by John Newton, and, until after the death of the said John Newton, it remained in the custody of the said Charles Thorp.

The said John Newton made another will, dated the 11th of January 1859, thereby revoking all former wills; and by it, after certain bequests to his wife during her life, with remainder

to the said plaintiff, and directing his personal estate to be sold, he devised his real estates to the said Arthur Fitzmaurice, his heirs and assigns, to the use of any child he might have, his or her heirs, for ever; and, in case there should be no such child, subject to the annuities thereby charged thereon, to the use of P. C. Newton for life, remainder to his first and other sons in tail; in default, to Beauchamp Frederick Bagenal for life, remainder to his first and other sons in tail, and, in default, to his own right heirs; and he thereby gave certain annuities and legacies, and appointed Arthur Fitzmaurice sole trustee and executor of his said will. This last will was prepared by Thomas Jameson, a solicitor, and was duly executed on the day on which it bears date; and, shortly after its execution, it was forwarded to said Fitzmaurice, in whose possession it remained until after the death of the said testator.

On the 7th of February 1859, Mr. Newton made a codicil to his last will, which was prepared by Mr. John Litton, a solicitor, and was duly executed on the day it bears date. From the time of its execution until after the death of Mr. Newton, the codicil remained in the possession of Mr. Litton. On the 16th of February 1859, Mr. Newton duly made a codicil of that date, which commenced as follows:—"This is a codicil to the last will and testament of me, John Newton, of Bagenalstown-house, in the county of Carlow, Esq., bearing date on or about the 4th day of February 1858, and which I desire may be considered as annexed to and be taken as part thereof." It then made provisions revoking the bequests to Philip Charles Newton, in case of marrying in the lifetime of the testator without his knowledge; and it terminated—"In all other respects I confirm my said will, especially that part of it whereby I charge my said estates with the sum of £500 for, and bequeath the same to, Beauchamp Newton Johnson, and which bequest I hereby repeat and re-affirm." The last-mentioned codicil was prepared in Dublin, by the said C. F. Johnson. After its execution, this codicil remained for a short time in the possession of the said C. F. Johnson; but, on the 10th of May 1859, Mr. Newton wrote the following letter:—

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"MY DEAR JOHNSON—I wrote to you on Sunday for the paper I executed about Ham, on account of his affair with Miss B.; will you be so good as to send it to me by return.—Ever yours, most truly—JOHN NEWTON." The person referred to in the said letter as "Ham" was the plaintiff P. C. Newton, and the paper referred to, the codicil of February 1859; and the said Charles Fraser Johnson forwarded it by post to Mr. Newton.

The petition of appeal then alleged that Mr. Johnson retained a copy or original draft of this codicil, which was lodged in Her Majesty's Court of Probate. That search was made for the said last-mentioned codicil, after the death of the said John Newton, but that it could not be found; and the appellant alleged that it was destroyed by the said John Newton in his lifetime, with the intention of revoking the same.

Mr. Newton having died, the plaintiff in the Court below, Mr. P. C. Newton, on the 27th of March 1860, filed the following declaration in the Court of Probate:—"Philip Charles Newton, by Thomas Jameson, his attorney, says that John Newton, Esq., late of Bagenalstown-house, in the county of Carlow, deceased, who died on or about the 21st day of October 1859, at Wilton, in the county of Wexford, made his last will and testament, and a codicil thereto, bearing date, to wit, the said will, on the 4th day of February 1858, and the said codicil, on the 16th day of February 1859, but which said will and codicil were not forthcoming at the death of said deceased, and which will and codicil were respectively in the words and figures, and to the purport and effect contained and expressed in two exhibits, deposited by C. F. Johnson, solicitor, in the registry of this Court, on or about the 19th day of January 1860, and referred to in the affidavit of said C. F. Johnson, filed in this Court on the 19th day of January last, and entitled, 'In the goods of John Newton, deceased,' and therein described as the drafts respectively of said will and codicil; and which said will and codicil were respectively reduced into writing, and signed by said testator in the presence of two witnesses, present at the same time, and who subscribed the same in the presence of said testator, and of each other; and the said testator was, at the

time of the execution of the said will and codicil respectively, of perfect sound mind, memory and understanding, and which said will and codicil were by said testator afterwards in his lifetime destroyed, with the design not of absolutely revoking same, but with the design of thereby giving effect to a certain other testamentary instrument, namely, a will, dated the 11th day of January 1859; and which object and intention of said testator having failed, by reason that such other testamentary instrument had been itself revoked, and become inoperative, the said will, dated the 4th day of February 1858, and codicil, dated the 16th day of February 1859, are unrevoked, and in full force and virtue; and in which will of the 4th day of February 1858 the said Philip Charles Newton is named as a devisee and legatee, and of which will said testator named William Forbes Johnson and Arthur Fitzmaurice executors." To this the appellant pleaded, and says that the will and codicil, in the declaration mentioned to bear date respectively the 4th of February 1858 and 16th of February 1859, formed the last will and testament of the deceased, and that the said will and codicil were, and each of them was, destroyed by the said deceased in his lifetime, with the intention of revoking the same.

The defendant B. F. Bagenal, who was a minor, pleaded by his guardian, that the will and codicil alleged by plaintiff were respectively destroyed by said testator in his lifetime, with the design and intent of absolutely revoking and rendering null and void the same will and codicil respectively; and that the true last will of said deceased testator was the will of the 11th day of January 1859. In April 1860, the intervenient, Thomasine Jane Roberts, by leave of the Court, pleaded that the said will of the 4th of February 1858, and said codicil of the 16th of February 1859, were not forthcoming, and, if destroyed by the said testator, were so destroyed by him with the design, object and intention of giving effect to said will of the 11th of January 1859; and that if the said design and object or intention had failed or been defeated, by reason that such other testamentary instrument of the 11th of January 1859 had been itself revoked and become inoperative, the said Thomasine Jane Roberts insisted that the will of the 4th of February 1858, and

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codicil of the 16th of February 1859, were unrevoked, and in full force and virtue, and the said Thomasine Jane Roberts a devisee or legatee named in said last mentioned will; but that, if said will of the 4th of February 1858, and codicil of the 16th of February 1859, were not in full force and effect, that said codicil or testamentary instrument of the 7th of February 1859 was in full force, and the said T. J. Roberts a devisee and legatee in the same.

In April 1860, the cause was set down for hearing before the Court of Probate, upon affidavits. In May 1860, the defendant B. F. Bagenal obtained leave of the Court to file further pleas, and, accordingly, pleaded, first, that the will bearing date the 11th of January 1859 was revoked, but was still the last will of deceased; and that the alleged codicil of the 16th of February 1859 was not the true last will and testament of said deceased, nor a codicil thereto, nor to any other will of deceased; for that deceased never executed said alleged codicil, knowing the contents and purport thereof, and with the intent that same should be his last will and testament, or any part thereof, or any codicil thereto; and that, if same was ever signed by him, still it was so signed by him in ignorance of the contents thereof, and without any intention that the same should be his last will and testament, or any part thereof, or any codicil thereto, or that same should revoke any will or bequest of his; and that it was so signed, being substituted by the solicitor of said deceased for and instead of an instrument of said deceased, intended to be of a different import and effect, which said deceased did intend to sign, and in fact supposed he was signing, when he erroneously put his name to said alleged codicil, contrary to his intention: and, secondly, that the will of the 11th of January 1859 was the last will and testament of said deceased, and was still unrevoked, and that the said alleged codicil of the 16th of February 1859 did not revoke same; for that, on the last mentioned day, said deceased being displeased with P. C. Newton, because of his then intending to contract a certain marriage, and said will being at that time the will and testament of deceased, he (said deceased) directed C. F. Johnson to draw up a codicil conditional upon, and in reference to, said marriage, in case same should take effect, and not otherwise,

and as a codicil, or in the nature of a codicil to his then last will ; but he did not direct that the same should refer to or set up any will dated the 4th of February 1858 ; and, therefore, the said C. F. Johnson, without instructions from, or knowledge of, deceased, and without the words hereafter mentioned being directed to be inserted therein, or being read by said deceased after insertion, added to and inserted in said paper or codicil the words following, that is to say, 'bearing date on or about the 4th day of February 1858,' 'and to the residue of my personal property out of the same land,' 'and personal ;' 'especially that part of it whereby ;' 'and which bequest I hereby repeat and re-affirm ;' and the said C. F. Johnson afterwards, by representing to said deceased that said alleged codicil, with said words so introduced (but without informing deceased of such words having been introduced), was framed according to his instructions, and without deceased having read same, or being aware thereof, or of the purport or effect of said paper or codicil, and without intending to revoke said last will, or any part thereof, except in the event of the solemnisation of said intended marriage, which never was solemnised, procured the signature of said deceased to said paper or codicil, and which paper or codicil was afterwards destroyed by said deceased, with the intent of rendering same wholly inoperative for any purpose. Wherefore defendant saith that said paper or codicil, so far as regards said words, so inserted as aforesaid, is not a will or codicil of deceased ; and said deceased never intended that said words should form part of said paper or codicil, or of any other will or codicil of said deceased, and said words ought to be expunged therefrom ; and that said will never was revoked by said deceased by said paper or codicil, or otherwise, but is now his true last will and testament."

On the 15th of May 1860, the appellant applied to the Court by motion, that the further pleas of B. F. Bagenal might be set aside, or reformed, as in the notice of motion mentioned ; whereupon, on the 22nd day of May 1860, it was ordered that the said order, bearing date the 8th day of May 1860, should be discharged, and that the said pleas, filed by said Beauchamp Frederick Bagenal, on the 8th of May 1860, should be set aside, and that the costs of said order, bearing date the 8th day of May 1860, and of said pleas, should

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be costs in the cause; and it was thereby further ordered that the following questions be tried by a special jury of the city of Dublin, before the Court itself; viz., First; "Whether the paper writing marked 'A,' and in the plaintiff's declaration mentioned, or any and what parts or part thereof, are or is a true copy of a codicil in said declaration alleged to bear date on the 16th of February 1859, and to have been made by John Newton, deceased, the deceased in this cause, and not now forthcoming, and to be a codicil to a certain will, in said declaration also alleged to have been made by said John Newton, deceased, and not now forthcoming, and bearing date the 4th of February 1858; and, if so, whether such alleged codicil, bearing date the 16th of February 1859, and said alleged will, bearing date the 4th of February 1858, were together, at any time, the last will and testament of John Newton, deceased?"

Second; "Supposing the said alleged codicil, bearing date the 16th of February 1859, or any parts or part thereof, and said alleged will, bearing date the 4th of February 1858, to have been together, at any time, the last will and testament of John Newton, deceased, were the said will and codicil subsequently revoked by the said John Newton?"

From this order the present appeal was brought by the heir-at-law of Mr. John Newton.

Mr. Serjeant *Lawson*, and Mr. *Brewster*, with them Mr. *Charles Shaw*, for the appeal.

*Argument.*

There is no use in sending to the jury questions of law. If it be admitted that the document produced is really a copy of the codicil of the 16th of February 1859, that codicil, of necessity, sets up the will of the 4th of February 1858, thus revoking the subsequent will. No evidence is admissible to show that Mr. John Newton had an intention different from the legal effect of his act. Since the Wills Act, 7 W. 4, and 1 Vic. c. 27, no evidence is admissible of an intention to revive a revoked will, save by the re-execution of it. Nothing, in fact, is to be decided in this case, except a question of law. If the Judge required further evidence, he ought to have obtained it under the 36th section of the Probate Act.

There is no evidence before the Court to raise any doubt upon the state of facts.

Mr. *Battersby*, Mr. *E. Johnston*, Mr. *J. T. Ball*, Mr. *J. E. Walsh*, Mr. *Lloyd*, and Mr. *Litton*, contra.

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The policy of the Probate Act is to have questions of fact determined by a jury. Here there are several questions of fact; one, whether the writing produced is a copy of the alleged codicil; another, whether the testator was aware of the effect of the codicil, or of his revocation of it; again, whether he intended to revoke the will: *Steward v. Snow* (a); *Perrott v. Perrott* (b); *Patten v. Poulton* (c); *Onions v. Tyrer* (d); *Goodright v. Glazier* (e); *Walpole v. Cholmondely* (f); *Kirke v. Kirke* (g); *Short d. Gastrell v. Smith* (h); *Locke v. James* (i); *Payne v. Trappes* (k); *Re De Rode* (l); *Re Applebee* (m).

The LORD CHANCELLOR.

This case comes before the Court upon an appeal from an order made by the Judge of the Court of Probate, by which he directs that certain issues shall be tried before himself and a jury. These issues relate to the will of the late Mr. John Newton, and beyond doubt they involve two questions of fact; that is to say, first; "Whether the paper writing marked 'A,' or any and what part or parts thereof, are or is a true copy of a codicil alleged to bear date on the 16th of February 1859, and to have been made by John Newton deceased, and not now forthcoming; and if so, whether such alleged codicil and the alleged will, bearing date the 4th of February 1858, were together at any time the last will and testament of John Newton deceased?" Second; "Supposing the

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(a) 1 Mil. 626.

(b) 14 East, 440.

(c) 4 Jur., N. S., 341.

(d) 1 P. Wms. 343; S. C., Prec. Ch. 459.

(e) 4 Burr. 2512.

(f) 7 T. R. 138.

(g) 4 Russ. 435.

(h) 4 East, 419.

(i) 11 M. & W. 901.

(k) 5 N. C. 152.

(l) 5 N. C. 189.

(m) 1 Hog. 143.

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said alleged codicil and will to have been together, at any time, the last will and testament of said John Newton deceased, were the said will and codicil subsequently revoked by the said John Newton?" Now, on the face of these issues, they are plain ordinary questions of fact, arising, and obviously arising, out of the proceeding before the Court; because that proceeding was instituted for the purpose of deciding whether these documents, or any others, constituted the will of Mr. Newton. The Judge of the Court of Probate, on examination of the evidence before him, which consisted mainly of two affidavits, and on inspection of the various wills executed by Mr. Newton, thought it was a case in which he ought to have the assistance of a jury in coming to a final opinion on the facts. As I have stated, this appeal is brought from his order directing these issues to be tried, and, on this ground, that in point of fact there was no question whatever to be tried; or that if there were one, it was one which ought not to be tried on an issue; but that it was the duty of the Judge to have decided the case, either on the evidence before him, or in a proceeding under the 36th section of the 20 and 21 Vic., c. 79; that he ought to have dealt with the case in one or other of these modes, and thus determined it, either upon mere affidavits and the documentary evidence before him, or upon the examination, and, of course, cross-examination of the witnesses taken before him in open Court, in pursuance of that 36th section.

Both of these propositions, however, amount to the same thing; that is, that there are questions in the case which are to be tried in some form, and further, that these questions are questions of fact, namely, whether in point of fact the codicil of 1859, and the will of 1858, made the last will of Mr. Newton? and whether these were afterwards revoked? These are questions of fact arising out of the proceedings in this suit. That being so, and there being these questions arising, and necessarily arising out of the proceedings, the 41st section of the Probate Act declares, that "It shall be lawful for the Court of Probate to cause any question of fact, arising in any suit or proceeding under this Act, to be tried

by a special or common jury before the Court itself, or by means of an issue to be directed to any of the Superior Courts of Common Law."

The Judge then is invested with the power of trying issues before a jury; and here, upon inspection of the documents, and having regard to the very peculiar circumstances of the case, and its great novelty, especially considering the number of instruments executed, he has thought it the safest course to call for a jury, and have the witnesses examined before it. But the appellant then says the question is not one of fact at all; it is purely a question of law which is to be tried, namely, whether, having regard to the evidence, even supposing it to be at all admissible, there is anything which would amount to a confirmation of a previous will? or whether the evidence is a mere nullity in the case? Again, as to the revocation of these instruments, it is said that this also is a question of law, or at all events that there is not any question of fact; that the document has not been found; that it has been traced into the testator's possession; that its absence cannot be accounted for, and therefore that a presumption of fact arises that it has been destroyed. Now, first, let me ask if we can assume here that such questions of law would be at all tried by the jury, or that the Judge would not tell the jury the conclusion which it would be proper for them to draw, from whatever state of facts should be proved? That observation applies to both issues; both may be mere questions of fact, or may turn out to be questions of fact and law mixed, so that the consideration of both must go together; and there might be great inconvenience in having such questions left to a jury: but it does not go before a jury alone, it goes before a jury and a Judge who will direct the jury, and we must assume that every proper direction will be given. If there be any error in the mode of leaving the case to the jury, we have before us several gentlemen of great ability who practise in the Court of Probate, and we have no doubt the proceedings will be narrowly watched, and will be put into a shape which will give an opportunity of correcting any mistake.

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Under these circumstances, are we, at this stage of the case, to say that it is not in the power of the Judge of the Court of Probate to hold that he would prefer having the case investigated before himself and a jury? In my mind, such a case is better disposed of so. I do not say that there may not be something which, in one view of the case, might appear to make it premature now to direct an issue. It may be that it would have been better to have had the examination of witnesses, and then to have the issue framed according to whatever might appear to be the difficulty. Where, however, the questions in issue respect matters of fact, are we to interpose, and say that they are to be tried in one way only? When it is said that there is a mixed question of law and fact, we must recollect that, were it not for this new tribunal, the question respecting the real estate which is in litigation must have been decided by a jury on a much wider issue, consisting only of a few words, if an issue was directed from this Court, or without anything whatever on record to point to the true question, if it were tried in an ejectment.

I do not now go into the question whether it will be possible to give evidence respecting the alleged mistake, or tending to show that the testator thought he was doing one thing when he did another; but at all events the question of mistake, if it arises at all, is a question for a jury: *Raworth v. Marriott* (a). Then it is said that there was a plain revocation here by destruction, which must be presumed. From the earliest times, however, the *animus*, the intention with which a testamentary instrument was destroyed, has been always held to be a question of fact. Whether it was to be decided on contemporaneous acts and declarations, or whether it was competent to go into evidence of subsequent declarations, I do not give any present opinion. But as to the nature of the alleged mistake, it must be remembered that *Perrott v. Perrott* (b) shows that the doctrine is not necessarily confined to a mistake in fact, but that a mistake in law also may render the effect of cancellation questionable.

On the whole case, therefore, we must affirm this order, seeing that there are questions of fact arising on the face of the proceed-

(a) 1 M. & K. 643.

(b) 14 East, 440.

ings, and that it would be very embarrassing to the working of the Court of Probate if an appeal lay from the Judge, merely because he preferred to have an investigation *in limine* before himself and a jury, and we were thus to deprive the Court of the discretion conferred on it, and to say, you must proceed under the 36th section, you cannot proceed under the 41st. We give no opinion as to the ulterior questions; we merely decide on the conduct of the trial, and we reserve all other points. It may be that, when the case comes to a further hearing, other questions will arise; but at present we think that we ought not to take the management of the case away from the Judge to whom it properly belongs.

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#### THE LORD JUSTICE OF APPEAL.

I quite concur with my LORD CHANCELLOR in the view he has taken of the case, and in every observation he has made upon it. The order appealed from was objected to on several grounds, impugning the power of the Court of Probate to submit to a jury the subjects of the issues it has directed; but, on a due consideration of them, I think the object of these issues is the ascertainment of matters of fact, which, on an issue *devisavit vel non*, would be examinable by a jury. They are, whether a copy of the codicil of the 16th of February 1859 be a true copy of it? Whether that codicil, with the will of the 4th of February 1858, which it refers to, were the will of John Newton, at any time; and if they were, whether they were revoked?

Every one of these inquiries, and the answers to them, are material; nor can I accede to the objection that any of them transfers to the jury matters of law, or can give them a greater latitude than that with which the law has invested juries in trying the due execution of wills of real estate.

On such trials, questions constantly arise in which the conclusions to be formed must be the result not only of the evidence of matters of fact, but also of the legal principles which it is the exclusive duty and province of the Judge to state for their government and their duty to observe; and there is, perhaps, no subject on

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which the assistance and control of the Judge is so indispensable as issues involving the revocation of testamentary instruments. Should a jury exceed the limits prescribed to them, and assume a right to disregard the law as propounded to them, they will in this, as they would be in all similar instances, controlled and corrected. But we cannot presume, much less act on, the presumption that they will exceed their province; and we may rest assured that they will receive from the learned Judge such assistance as will enable them to fulfil their own peculiar duty, without encroaching on his.

It did occur to me, during the argument, that we should have had better, at least more specific, grounds for the consideration of the order, had the case been more fully investigated, and a cross-examination been had of the witnesses, especially of Mr. Johnson. But, considering that this was a case of an alleged disposition of real property, by testamentary instruments, and that the Judge deemed the assistance of a jury to be of importance, I cannot see how it is possible to question his jurisdiction to make the order, or control his discretion as to the time or stage of the proceedings at which it should be made.

*Court of Appeal Hearing Book 1, f. 384.*

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RICHARD JAMES LONG\*

v.

HILL GILLMAN LONG, MARY ANNE FAIRTLOUGH,  
 The Rev. EDWARD FAIRTLOUGH, EDWARD CONNOLLY  
 and JOHN HOPKINS.

*Nov. 7, 8.*

In 1808, L., THIS case came before the Court on a petition of appeal from an order of the Master of the Rolls, dated the 9th of June 1860, by being seized of a lease for lives renewable, conveyed it to his eldest son J. for life, with remainder to X, the eldest son of J. In 1813, L. acquired the reversion of the renewable lease, and in 1822 conveyed the reversion

\* *Coram* the LORD CHANCELLOR and the LORD JUSTICE OF APPEAL.

which the petition was dismissed with costs, under the circumstances following :—By an indenture, dated the 11th of March 1781, William Tonson demised to Daniel Callaghan the lands of Shanavagh—[*See 10 Ir. Chan. Rep.*, p. 406]—for three lives, with a covenant for perpetual renewal, on payment of a fine of £6; and Daniel Callaghan thereby covenanted to pay the renewal fine within twelve months after the death of each life, and in default to pay a penalty of five shillings like currency per month. The reversion in fee of the said premises, afterwards, and at the date of the renewals, next stated, was vested in William Lord Riversdale, and the lease in Richard Long, great-grandfather of the petitioner. By indenture, dated the 1st of August 1801, Lord Riversdale granted to the said Richard Long a renewal of said lease of 1781; and by indenture, dated the 19th of April 1808, a further renewal of the said lease of 1781, for the lives of William Swanton, Catherine Swanton and Robert Swanton. In 1809, the lessee's interest, under the lease and renewals, was conveyed to the use of James Long, grandfather of the petitioner, for life, with remainder to the use of his only son, Richard James Long, the father of the petitioner, *quasi* in fee; the said James Long died in the year 1815, and the said Richard James Long, his only son, in 1852. The reversion on the lease and renewal, in the year 1813, became vested in the said Richard Long, who, by indenture, dated the 3rd of August 1822, conveyed the said reversion to Richard Long his son, in fee. Richard Long the son, in or about the year 1833, died intestate and without issue, and thereupon the said reversion vested in George, his eldest brother of the whole blood, as

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to R., the eldest son of his second marriage. In 1854, H., the heir-at-law of R., filed a cause petition against the executrix of X, to recover arrears of the rent against X's assets. As a defence to that suit, it was alleged that L. was insane when he executed the conveyance of 1822. In May 1857, H. served a notice on Y, the heir of X, and also of L., calling on him to take out a renewal. To this notice Y returned an answer, declining to take out a renewal till H.'s right was established in the cause petition, but nominating lives to be inserted in the next renewal, if H. should establish his right, and stating his readiness to pay into Court the amount of the renewal fines, to the credit of the then pending petition. In June 1857, the Master made an order establishing H.'s right to the reversion, as against the executrix, which was affirmed on appeal, on the 11th of January 1858. There were some further proceedings in H.'s suit up to November 1858. In December 1858, Y tendered a renewal and fines to H., and filed a petition for renewal in February 1859.—*Held*, that the tender was too late, and that the right of a renewal was forfeited.



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 —  
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heir-at-law, and, on the death of George Long, descended on Hill Gillman Long, his eldest son and heir-at-law. Richard Long, the grantor in the deed of 1822, at the time of the execution thereof, was odd and eccentric in his habits, and the petition alleged him to have been unreasonable in his language, unsound in his mind, and considered by many members of his family incapable of managing his affairs or making a deed. He died some time in the year 1823, leaving Richard James Long, the son of James Long, his grandson and heir-at-law. The said Richard James Long was about twelve years old at the time of the death of his grandfather, the said Richard Long, the grantor, and alleged to have been ignorant of the deed, of the circumstances which made that deed invalid or questionable, and of his rights as against that deed; but he paid the reserved rent to the persons entitled, under the deed of 1822, until the year 1845, fourteen years after he had attained his age. In that year, however, he set up a claim to the reversion, and never afterwards paid any rent. He died in the year 1852, leaving the petitioner his only son and heir-at-law, having made his will, whereby he devised all his estate in the said lands of Shavanagh to the use of the petitioner, who was an infant at the time of the decease of his father, and did not attain his age until the 18th of March 1857. During the lifetime of Richard James Long, no proceedings ever were taken to enforce payment of the rent reserved by the lease of 1781; but after his decease, that is to say, in May 1853, George Long filed a cause petition, claiming an arrear of rent as due to him by the said Richard James Long, praying for the administration of his real and personal estate, and naming as respondents therein, amongst other parties, the petitioner and Ellen Long, the personal representative of the said Richard James Long. The petitioner never appeared in the said cause, nor was a guardian *ad litem* ever appointed for him therein. George Long died in 1853, and the respondent Hill Gillman Long revived the said cause petition. Ellen Long, as the personal representative of Richard James Long, raised in the cause petition matter the question of the validity of the said deed of August 1822, and litigated the right of Hill Gillman Long to the said rent.

In 1854, this cause petition having come on to be heard before Master Litton, Counsel on behalf of Ellen Long insisted that an issue should be directed to try the sanity of Richard Long at the time of the execution of the grant of 1822. The Master refused to direct this issue; and Ellen Long appealed from his order, which was affirmed by the Master of the Rolls; on the 21st of November 1854 (a). Ellen Long subsequently adduced evidence to show the insanity of Richard Long the grantor, at the time of the grant; but the Master, by his final order, dated the 15th of June 1857, declined to direct an issue as to the sanity of Richard Long, and declared the demand of Hill Gillman Long for the arrears of rent well proved. By this order he determined the amount due for rent to Hill Gillman Long, including the amount due up to the last gale day, and directed the appointment of a receiver to raise the amount. In order to avoid the appointment of a receiver, Mrs. Long brought into Court the entire amount found due, and subsequently appealed from the Master's order. On the 7th of November 1857, the Master of the Rolls made an order, reciting that the question raised before the Master would arise in the action which must be brought to recover the rent accrued since the death of Richard James Long, directed the further consideration of the case to be postponed till the 3rd of December 1857; and, in the event of an action being brought on or before that day, it was ordered to stand over till judgment should be obtained in that action. No action was brought, and, on the 11th of January 1858, his Honor varied the Master's final order, in relation to that portion of the rent which accrued due after the death of Richard James Long, and affirmed the Master's order in all other respects.

Subsequently an application was made to the Master, by Hill Gillman Long, to have the entire amount paid out to him, which had been brought in by Ellen Long; and this application was granted, upon the ground that the rent accrued after the death of Richard James Long would have been paid by the receiver, if one had been appointed; and that the fund having been brought in, to

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(a) See 4 Ir. Chan. Rep. 106.

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avoid the appointment of a receiver, must be treated as if it had been received by a receiver. From this order Ellen Long appealed; but it was affirmed by an order made by the Master of the Rolls in November 1858.

The petitioner attained his age on the 18th of March 1857, before the Master's final order in Hill Gillman Long's suit; but during his minority he had sought to obtain evidence on behalf of Mrs. Long, had made an affidavit on her behalf, and, to some extent, acted as her agent. Shortly after his attaining his age, and in the month of May 1857, a notice, signed by the respondent Hill Gillman Long, was served on the petitioner, directed to all persons concerned, requiring them to renew the said lease, within two months, and pay the rent, renewal and septennial fines. In reply the petitioner served the following notice:—

"SIR—In reply to your notice, dated the 15th instant, I have to say, first, that unless and until your right to the reversion, rent and fines therein mentioned is established in the matter of *Long v. Long*, now pending in the Court of Chancery, I cannot comply with your demand. Second; that I name the lives of Her Royal Highness Louisa Caroline Alberta, His Royal Highness Arthur William Patrick Albert, His Royal Highness Leopold George Duncan Albert, three of the children of Her Majesty Queen Victoria, as the *cestui que vies* to be named in the next renewal, in case you shall establish your right to the said reversion. Third; that I am ready to pay all fines mentioned in your said notice into the Court of Chancery, to the credit of the said matter of *Long v. Long*, or to trustees to be for that purpose nominated. Fourth; I require you to inform me of the amount of fines claimed by you to be due. Fifth; this notice is not to prejudice the proceedings in *Long v. Long*.

"Dated this 30th day of May 1857.

"R. J. LONG."

"To HILL G. LONG, Esq."

To this the respondent did not reply; and after the appeal motion in November 1858 was decided against Ellen Long, the petitioner,

on the 30th of November 1858, served on the respondent Hill Gillman Long a notice referring to the notice of the 30th of May 1857, and requesting him to furnish particulars of the fines, interest, septennial fines and rent; to which the respondent did not reply, save by saying to the person who served it that he would not renew.

In December 1858, the petitioner caused a tender to be made to said respondent of a draft renewal and rent and fines, which he refused to accept; and the petition was filed on the 7th of February 1859, praying a renewal of the lease of 1781. Hill Gillman Long answered the petition on the 28th of March 1859. The cause came on to be heard on pleadings and proofs, on the 24th of November 1859, before the Master of the Rolls, when his Honor was pleased to order that the further hearing of said cause should stand over, and that the said petition should be amended, by making Mr. and Mrs. Fairtlough and their trustees parties. This amendment was made on the 4th of January 1860; and the petition matter having been finally heard before his Honor the Master of the Rolls, on the 9th of June 1860, his Honor made a decree, dismissing the said petition with costs, to be paid by petitioner to said respondents Hill Gillman Long, the Rev. Edward Fairtlough and Mary Anne his wife.

From this decision the present appeal was brought.

The *Attorney-General*, Mr. Serjeant *Sullivan*, Mr. *R. R. Warren* and Mr. *Exham*, for the appellant.

The controversy in the cause of *Long v. Long* was a fair and *bona fide* controversy, as to whether or not Richard Long, the grantor in said deed of 1822, was of unsound mind when he executed same, and pending said controversy, which was raised by petitioner's mother when the petitioner was a minor, and not a party to the cause. It was not reasonable to require him to take out a renewal from a person whose right and title to grant it was disputed, and when, if such controversy was decided in favour of the petitioner's mother, he would have been himself entitled to the lessor's and lessee's interest in said original lease. The service of the notice to renew was not done for the purpose of compelling the

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payment of fines, but of inducing the petitioner to acknowledge the respondent's title, and thus, in effect, to put an end to the question raised in the cause of *Long v. Long*. The service of a notice under the Tenantry Act must not be made for an indirect purpose. The notice of the 30th of May 1857 was a fair notice on the petitioner's behalf, and all fair terms were offered by it, and the petitioner offered to renew, and tendered the draft renewal and all rent and fines, within a reasonable time after the said question in controversy in said cause of *Long v. Long* had been decided in the respondent's favour. The time for renewal did not begin to run till after the decision in Hill Gillman Long's suit. A tenant, *bona fide* believing himself to be entitled to the reversion on his lease, is not bound to sacrifice his reversionary interest. The old principle of feudal law, forfeiting a tenant's interest for claiming the reversion, does not apply here, for it never was a principle of this Court; and even if it were, there was not any disclaimer on record. If there were two adverse claimants of the reversion, surely the tenant would be entitled to require them to decide which was entitled, before incurring a forfeiture, by omitting to renew; does it make any difference that the tenant himself is one of the claimants? The petitioner has not been guilty of any fraudulent conduct, or any such laches as should disentitle him from obtaining the renewal sought by the petition. His delay is fully and fairly accounted for; the former suit of *Long v. Long* did not terminate till November 1858. Up to that time it seemed necessary for Hill Gillman Long to take some steps to establish the sanity of the grantor in the deed of 1822.

Mr. Brewster, with him Mr. Serjeant Lawson and Mr. O'Riordan, for Hill Gillman Long.

Even if a tenant can, after service of a notice to renew, dispute his landlord's title, without forfeiting his right of renewal, which would be a difficult proposition to maintain, there has been in this case undue delay in seeking for a renewal. The petitioner, by his own notice of the 30th of May 1857, staked his right to the reversion on the event of Hill Gillman Long's suit; and he was bound to be active in seeking for a renewal as soon as that was determined.

That suit was successful on the 11th of January 1858, yet the petition here was not filed for more than a year afterwards. The subsequent proceedings in that former suit had nothing to do with the determination of the right of Hill Gillman Long, which was fully established on the 11th of January 1858. There was very great delay after the service of the notice of 1857, and the only excuse made for it is in itself a breach of duty on the part of the petitioner. In truth, the whole conduct of the petitioner was fraudulent, for he was the real actor in the former suit of Hill Gillman Long, and the defence of Ellen Long was in truth and substance his.

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Mr. *Chatterton* and Mr. *J. P. Kennedy*, for the respondents Fairtlough and wife, and their trustees, were stopped by the Court.

The following cases were mentioned and discussed in the course of the argument: *McDonnell v. Burnett* (a); *Jackson v. Saunders* (b); *Doe d. Phipps v. Rolling* (c); *Burton v. Fitzsimon* (d); *Wood v. Knox* (e); *Bulter v. Portarlington* (f); *Fitzgerald v. O'Connell* (g); *Wallace v. Patton* (h).

THE LORD CHANCELLOR.

In this case, which has been heard before us at considerable length—a length, however, for which no apology need be made, I must say that I never have heard facts or arguments pressed more earnestly; but, on the whole case before us, we are of opinion that we ought not to disturb the order made by his Honor the Master of the Rolls. The case has been very much narrowed in argument, and has, I may say, come to a single point; and upon that point the Master of the Rolls decided that an unreasonable time has elapsed since a demand to renew was made upon the tenant, by a notice within the provisions of the Tenantry

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(a) 4 Ir. Eq. Rep. 216.

(b) 1 Sch. & Lef. 455.

(c) 4 Com. B. 188.

(d) Fin. Ren. 312.

(e) 3 Ir. Chan. Rep. 109.

(f) 1 D. & War. 20.

(g) 1 J. & L. 134; S. C., 6 Ir. Eq. Rep. 455.

(h) 1 Ir. Eq. Rep. 338.

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he should still retain a right to the benefits of the relation he had disclaimed. I will not assert that such a case may not exist. I can only say that I have been unable to discover that any such case has ever occurred. I do not think that the present calls for a decision of the abstract point, when one considers the real and important facts in the case, which I shall now detail:—The notice was served in May 1857; the answer to it, which is one of the most material documents in the case, is as follows:—"SIR—In reply to your notice dated the 15th instant, I have to say, first, that unless and until your right to the reversion, rent and fines therein mentioned is established in the matter of *Long v. Long*, now pending in the Court of Chancery, I cannot comply with your demand." Now, in the first place, that puts the petitioner in entire privity, as between him and the respondent, with the then pending cause of *Long v. Long*. By that first paragraph he puts himself in the position of a person who, *pro bono et malo*, takes with that, and says he will abide by the decision in it. "If it be determined in my favour, there is an end of all question between us; I am entitled to hold the land in fee-simple; but, if it be decided in your favour, then I will comply with your demand." What was that demand? It was a notice requiring the payment of the fines within the space of two months. Now there is no allegation that two months did not afford time enough to ascertain the amount; that is not the case now made, and it would be unfounded if it were attempted. The petitioner says simply that he will comply with the respondent's demand, whenever *Long v. Long* may be decided, if such decision show that he is bound so to do.

The next clause of this document takes up a position which may be good, or may be bad, according as the events may happen, by naming the lives whom he wishes to have inserted in the lease, in case it is to be granted; and he then alleges that he is ready to pay all fines into the Court of Chancery to the credit of the matter of *Long v. Long*: but he only says he is ready; he has made no attempt, by motion or otherwise, to carry out that readiness; and then requires to be informed of the amount of fines claimed to be

due, as to which there is no pretence for asserting that he was really ignorant, and concludes by saying that the notice was not to prejudice the proceedings in *Long v. Long*. It is impossible to read that notice without perceiving that it put the petitioner in entire privy with the former case of *Long v. Long*, and that he undertakes to abide by whatever shall be there determined in that suit about the right, not merely as to some particular gale of rent. When then was that right determined in that suit? Beyond all doubt it was determined on the 11th of January 1858. It is said that something still remained to be done; but it was merely consequential relief flowing from the other decision. It was merely a technical question which remained to be discussed; that is, whether, in that suit, the petitioner could recover arrears of rent which accrued due after the testator's decease; so that the subsequent contest was purely technical, while the general right had been decided before. But the petitioner was not yet contented or prepared to abide by the decision in *Long v. Long*; and he continued to refuse payment. Even here it was argued that the intention of that contest was to put the respondent to an ejectment, or a Common Law action to recover those arrears—in point of fact to compel him to raise every question which had been decided in *Long v. Long*, the cause by the result of which the petitioner had in his notice undertaken to abide. Under these circumstances, it appears to me that the litigation, after the 11th of January 1858, was not *bona fide*; that, whatever the character of that litigation may previously have been, there was no sound reason for delay after that date, and that the decision of the Master of the Rolls was consequently right, and must be affirmed.

1860.  
Ch. Appeal.  
LONG  
v.  
LONG.  
Judgment.

THE LORD JUSTICE OF APPEAL.

I entirely concur with my LORD CHANCELLOR in the opinion that the petition of appeal in this case must be refused. It is unnecessary for me to go through the facts of the case, which have been already so fully stated. I shall shortly state the ground of my opinion, that the decree of the Master of the Rolls was right. In a suit of this kind, for the specific execution of a covenant for perpetual



1860.  
*Ch. Appeal.*  
LONG  
v.  
LONG.  
—  
*Judgment.*

renewal, the right must be grounded on an admission of the title of the defendant. The claim of the tenant can only be based on the full power of the landlord to grant the estate sought for. It is, therefore, indispensably necessary for the tenant to admit the landlord's title in its entirety, and in the most unequivocal manner. He cannot, in such a suit, contest a right on the admission of which his own is wholly founded. It would be, in my opinion, a plain violation of this principle to allow him to allege or plead as a justification in excuse for the delay, in its nature fatal to his case, a litigation in which he had unjustly and unsuccessfully contested the very title the admission of which is the indisputable condition of the relief he seeks for.

*Court of Appeal Hearing Book, 1, f. 383.*

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1860.  
Chancery.

KNOX v. MAYO.

(In Chancery).

Nov. 14.

THIS case came before the Court on a return to a writ of partition, and the further directions reserved on the former hearing, at which costs also were reserved. The case is reported *supra*, vol. 7, p. 563.

Mr. *Henry H. Hamilton* and Mr. *Carleton*, for the petitioner, contended that the respondent, Lord Mayo, ought to pay to the petitioner the costs occasioned by his having disputed the petitioner's title. The respondent had occasioned considerable additional expense at the hearing, and in the preparation of the case. In the Court of Appeal, the costs of the appeal had been awarded against Lord Mayo. It was settled that a respondent who litigated the petitioner's title in a partition suit might be compelled to pay the costs occasioned by such litigation: *Lyne v. Lyne* (a); *Hill v. Fullbrooke* (b); *Morris v. Timmins* (c).

Mr. Serjeant *Lawson* and Mr. *Todd*, contra.

The rule respecting costs in a partition suit is well settled. Each party must bear his own costs up to the first hearing, and the subsequent costs must be borne rateably. The cases cited only show that any expense not a portion of the costs of preparing for the first hearing, occasioned by one of the parties, may be thrown upon him. In *Lyne v. Lyne*, the defendant had insisted on having an inquiry directed at the first hearing. In *Morris v. Timmins*, the case was properly one of specific performance, and the partition relief merely incidental. In *Hill v. Fullbrooke*, the costs which the defendant was obliged to pay were those of an account directed at the first

The respondent in a partition suit resisted the petitioner's claim, alleging that the petitioner was not seized of any portion of the lands in question. Considerable expense was thus imposed on the petitioner; but that expense was entirely incurred before and at the first hearing, at which a decree for partition was made, and further directions and costs reserved. At the hearing on the return to the writ of partition and further directions — *Held*, that the petitioner was not entitled to be paid by the respondent any portion of his costs up to and including the first hearing.

Argument.

(a) 21 Beav. 318.

(b) Jac. 574.

(c) 1 Beav. 411.

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*Chancery.*  
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 —  
*Argument.*

hearing, in consequence of his resisting the plaintiff's claim. Here, the only additional costs subsequent to the first hearing were those of the appeal, which we were directed to pay. Even if a case could at all be made for giving extra costs to the petitioner, the direction for so doing must be given at the first hearing, when the Judge has all the facts before him.

*Judgment.*

The LORD CHANCELLOR said that he saw no reason to depart from the usual rule as to costs in partition suits. Under any circumstances the petitioner must have proved his title.

*General Hearing Book, 26, f. 288.*

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### WALCOTT v. SMYTH.

*Nov. 15.*

A judgment recovered in 1819, and never revived nor re-docketed, must be postponed not only to the sales of a rentcharge created by the judgment debtor in 1827, and assigned in 1841, which accrued due after that period, but to the arrears of it which were then due, and which were included in the assignment.

*Statement.*

THIS cause came before the Court upon exceptions taken by William O'Dell to the Master's report, under a decree, dated the 21st of November 1842, by which it was referred to him to take an account of the sums remaining due to the plaintiffs on foot of their several demands, and an account of the real and personal estate of William Smyth, deceased, and of all charges and incumbrances affecting the same.

The Master, by his report, filed on the 2nd of July 1860, found, amongst other things, that by deed, bearing date the 1st day of August 1827, and made between the said William Smyth, of the first part, John Walcott, of the second part, Samuel Walcott, of the third part, Thomas Lyons Walcott, of the fourth part, and Edward Wright Seymour, of the fifth part, the said William Smyth, in consideration of £950, granted unto the said Thomas Lyons Walcott an annuity or yearly rentcharge of £120. 10s. 6d., charged upon the lands in the decree mentioned, for the life of one Thomas Brasill, and to be payable half-yearly, on the 24th day of June and the 24th day of December; and that thereby also a term of ninety-nine years

in the said lands was created and vested in Edward Wright Seymour, for securing the same. The Master also found that, by an indenture, bearing date the 16th day of July 1841, and made between Samuel Walcott, of the first part, W. H. L. Walcott, of the second part, Minchin Walcott, of the third part, Anne Walcott, executrix of the said Thomas Lyons Walcott, of the fourth part, and John Crossley Seymour, of the fifth part, in consideration of £1250, the said annuity, and all arrears thereof, and a judgment collateral therewith, were assigned by Samuel Walcott and Anne Walcott to John Crossley Seymour, by way of mortgage. And the Master, by his report, also found that the said Thomas Brazill, the *cestui que vie* of the annuity, died about the 24th of December 1841, and that at his death £1113 remained due on foot of the annuity; £1053. 1s. 1d. due before the deed of July 1841, and £60 subsequently. The Master further found that a judgment for £660, obtained in Hilary Term 1819, against William Smyth, and vested in the said William O'Dell, not having been revived or re-docketed, was the twenty-fourth charge on the lands, and should be postponed to the arrears of annuity assigned in mortgage by the said deed of the 15th of July 1841.

To this report William O'Dell filed several exceptions. The first; that the judgment of Hilary Term 1819 should have been found to be the third charge on the lands. The second; that the Master should have reported that the annuity ceased on the death of Thomas Brazill, and that the arrears thereof were a charge on the lands only for the term of ninety-nine years, vested in Edward Wright Seymour; and that, inasmuch as said term was not assigned by the deed of 1841, the judgment of Hilary Term 1819 was a charge on the lands prior to the annuity, and to all other charges, save No. 1 and No. 2. The third; that only the arrears of annuity which accrued due subsequent to the deed of July 1841 should have been reported prior to the judgment of Hilary Term 1819. The fourth; that, inasmuch as the deed of 1841 was executed *pendente lite*, it could not operate to postpone the judgment of Hilary Term 1819.

The other exceptions were not material.

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SMYTH.  
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1860.  
*Chancery.*  
**WALCOTT**  
*v.*  
**SMYTH.**  
*Argument.*

Mr. *F. W. Walsh* and Mr. *Palles*, in support of the exceptions.

The deed of 1841 cannot in this case give any higher right to the assignee than the original annuitant had. It is true that, upon another portion of this very deed, it was decided in *Walcott v. Condon* (a), that a sub-mortgagee is entitled to the benefit of the Re-docketing Act, although the original mortgagee may not be in a position to set it up. This, however, is quite a different case. What was *de facto* assigned here was not an estate or interest in the land, but a mere right of suit for the arrears of annuity which had then accrued due. It might have been very different if the term had been assigned to secure the arrears; then there would have been an estate in the land, but the arrears of a rentcharge cannot be so described. *Malcolms v. Charlesworth* (b) goes further than is required to support those exceptions; for it shows that an assignment of a legacy charged on land is not affected by the English Registry Act; and though the applicability of that case to the more stringent Registry Acts of this country has been questioned, there seems no reason to believe that its authority is shaken in England. Then the words of the Re-docketing Act are not so strong as those of the Irish Registration Act; and thus, assuming *Walcott v. Condon* to be law, the present case is quite distinguishable. The annuity here was purchased *pendente lite*, and can give no higher title than the assignor had: *Hunter v. Kennedy* (c); *Murtagh v. Tisdall* (d); *Bennett v. Bernard* (e); *Bellamy v. Sabine* (f).

Mr. *R. R. Warren*, contra, was stopped by the Court, having mentioned *Low's Estate* (g).

THE LORD CHANCELLOR.

*Judgment.*

I think that Mr. Seymour is entitled to the benefit of the provisions of the Re-docketing Act. The only question really is,

(a) 3 Ir. Chan. Rep. 1.

(b) 1 Kea. 63.

(c) 1 Ir. Chan. Rep. 148.

(d) 3 Ir. Eq. Rep. 85.

(e) 10 Ir. Eq. Rep. 584.

(f) 1 De G. & J. 566.

(g) 4 Ir. Chan. Rep. 97.

whether the arrears of the annuity can be said to be a right, title, estate, or interest in land? and it would be very difficult to assert that they cannot be so described. The case of *Walcott v. Condon* (a) was decided by Lord Chancellor Blackburne on this very deed of the 15th of July 1841, which comprised not only the annuity of 1827, but a mortgage of 1825; and his Lordship there held that Mr. Seymour was, as assignee of the mortgage, entitled to the benefit of the Act, as between him and the judgment creditor of the mortgagor, though Walcott, the immediate mortgagee, would not have been. I cannot distinguish the present case from *Walcott v. Condon*. Here there is the grant of a rentcharge, a perfectly legal grant. The arrears also remain a legal demand upon the land, secured by the term, which, to be sure, was not assigned by the deed; but the trustee of the term is trustee for the true owner of the arrears, and, if the assignee be the true owner, he is a trustee for him. I cannot distinguish this from the case of the mortgage; but Mr. O'Dell can, if so advised, raise the general question by appeal. I think the Master's report right, and founded upon right principles; and I must, therefore, overrule the exceptions, with costs.

(a) 3 Ir. Chan. Rep. 1.

*Reg. Lib.*, 26, f. 303.

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*Chancery.*  
WALCOTT  
v.  
SMYTH.  
Judgment.

ADAMS v. GAMBLE.

THIS case came before the Court upon a cause petition, and answering affidavits, under the circumstances following.

By a lease dated the 10th of April 1791, the lands of Anticor were demised to John Adams, for three lives renewable for ever. John Adams made his will, dated the 25th day of February 1799, which contained the following devise:—"I also leave and bequeath to my daughter Isabella Adams the leases of all the lands which I

Nov.  
Dec. 3.  
An estate of  
descendible  
freehold, set-  
tled to the  
separate use  
of a married  
woman, can-  
not be validly  
conveyed by  
her without  
fine or statute  
deed.

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 —  
*Statement.*

now possess, to her, to have and to hold, enjoy and possess, and to her heirs and assigns for ever, reserving it in her own power from any husband or husbands which she shall marry or be married to." John Adams died shortly after the date of his said will; and in 1801 Isabella Adams intermarried with one James Gamble; there was no issue of that marriage; and in 1842 Isabella Gamble died, leaving her husband her surviving. By an indenture dated the 30th of April 1822, and made between Sarah Leslie of the one part, and the said James Gamble and Isabella Adams his wife, of the other part, the lease of the said lands of Anticor was renewed to the said James Gamble and Isabella his wife, for three additional lives, to hold the same to the use of the said James Gamble for life, and, from and after his decease, to the use of such person or persons as the said Isabella should by deed or will appoint; in default of appointment, to the use of the said Isabella, her heirs and assigns. By deed dated the 23rd day of May 1835, and made between the said Isabella Adams, otherwise Gamble, of the one part, and the said James Gamble of the other part, the said Isabella professed to convey the lands of Anticor to the said James Gamble. James Gamble died in 1858, having devised his interest in the said lands to the respondent. The present petition was filed by the heir-at-law of Isabella Adams, and prayed that the renewal to James and Isabella Gamble might be declared a trust for him; and for a conveyance of the lands comprised in it.

*Mr. J. E. Walsh* and *Mr. Harrison*, for the petitioner.

*Argument.*

The only question in this case is respecting an estate of freehold, settled to the separate use of a married woman, whether she can dispose of it as if she were a *feme sole*? The earliest case on the subject is *Churchill v. Dibben* (a), where the question was as to lands purchased by the wife with personal estate which was her absolute separate property, and which she was held not to be able to deal with as if she were a *feme sole*. The analogy of legal estates was also applied in the case of *Peacock v. Monk* (b). The reason

(a) 2 Ken., pt. 2, 85; S. C., 9 Sim. 447, n.

(b) 2 Ves. sen. 192.

of the distinction between realty and personality in this respect is, that it is only the marital right of the husband which the separate use is intended to exclude. It does not otherwise modify the nature of the wife's property; so she can dispose of chattel property, in which only she herself and her husband are interested; but in the case of realty, the heir has a title which can only be defeated by fine or statute deed. That is the scope of the old authorities, and they are followed in the very recent cases of *Harris v. Mott* (a); *Newcomen v. Hassard* (b); *Moore v. Morris* (c). *Lassence v. Tierney* (d), and *Field v. Moore* (e), show that in no case will the law dispense with the formalities imposed by statute on the disposal of an estate by a married woman: *Goodill v. Bingham* (f); *Doe d. Stephens v. Scott* (g). If a woman has a separate estate, with an express power in addition, she can dispose of the property by the aid of the power; but otherwise she cannot, if it be held for any greater interest than her own life. *Baggott v. Meux* (h) only shows that a married woman can have separate interest in fee-simple estate.

Mr. *Hugh Law* and Mr. *May*, contra.

It is now the settled law of this Court, that a woman, if not expressly restrained from anticipation, can dispose of all property settled to her separate use, as if she were a *feme sole*. That has been constantly held here, from the decision of *Grigby v. Cox* (i), and *Pybus v. Smith* (k), to the present time; and *Tullett v. Armstrong* has at last settled the doctrine respecting restrictions or anticipations upon a rational and intelligible basis. *Wilcox v. Hannington* (l) is an express decision on the power of a married woman to bind her separate fee-simple estate, and is, therefore,

(a) 14 Beav. 169.

(b) 4 Ir. Chan. Rep. 268.

(c) 4 Drew. 33.

(d) 2 H. & Tw. 115.

(e) 19 Beav. 134; S. C., 2 Jur., N. S., 150.

(f) 1 B. & P. 192.

(g) 4 Bing. 506; S. C., 2 Moo. & P. 317.

(h) 1 Coll. 138; S. C., 1 Phil. 627.

(i) 1 Ves. sen. 517.

(k) 1 Ves. jun. 193.

(l) 5 Ir. Chan. Rep. 38.

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*Chancery.*  
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 —  
*Argument.*

even a stronger case than the present, where the claimant is merely a special occupant. *Wright v. Cadogan* (a), *Rippon v. Dawding* (b), are also express authorities for the respondent, the devise of a woman seised of separate estate having been established against her heir: *Major v. Lansley* (c). In *Power v. Bailey* (d), an annuity granted by a married woman out of her separate estate was established. *Bagot v. Meux* (e) carries the respondent's case the entire way; for if it is necessary to insert a condition against alienation in a settlement of real estate, and if it can have any effect, what is the distinction between separate interest in realty and personalty? The distinction taken between realty and personalty is unfounded. The Court of Equity regards the interest of the wife more than that of the heir.

Dec. 3.  
*Judgment.*

THE LORD CHANCELLOR.

The petition in this case has been filed in order to establish the petitioner's right to certain lands, which were devised by John Adams to his daughter Isabella Adams, "to have, hold, enjoy and possess, and to her heirs and assigns for ever, reserving it in her own power from any husband or husbands whom she should marry." The petitioner claims to be heir-at-law of Isabella Adams. The respondent relies upon a deed executed by her during her coverture; and he submits that by this she had conveyed the estate which she held *in quasi* fee; and that, consequently, the heir is barred. Thus, the question has been raised, and discussed at the hearing very fully, whether a married woman having property in fee, settled to her separate use, but not subject to any special power of appointment, could, by an instrument not acknowledged under the statute, convey it so as to defeat her heir? The petitioner contends that, according to well established doctrines of law, she could not do so. The respondent, on the other hand, says that such never was the law, or that, if it ever was, the course of modern decisions has been to the contrary.

(a) 1 B. P. C. 486.

(b) Amb. 565.

(c) 2 R. & M. 355.

(d) 1 B. & B. 49.

(e) 1 Coll. 138; S. C., on Appeal, 1 Ph. 627.

I have examined all the decisions, and I must say that I have been unable to find any authority which affirms the proposition that a married woman so circumstanced can dispose of the estate, otherwise than by fine or statutory deed. The current of authorities and opinions, as shown by the text-books and the *dicta* of Judges, is almost uniformly to the contrary; and there is not even a *dictum* of modern date in its favour. The first authority distinctly in point is the anonymous case cited in *Peacock v. Monk* (a), and it is almost an express decision on this case. It was a case in which real estate of a wife was secured to her separate use by a settlement executed before her marriage, which did not contain any power of devising it; and it was determined that her will was void as to this real estate, and that the estate must go to her heir-at-law. The distinction is taken in *Peacock v. Monk*, that she can dispose of an estate so limited, if she has also an express power given to her by the settlement, either by way of trust, or of power over a use. In *Churchill v. Dibben* (b), it was held that a married woman having real property settled to her separate use, out of the savings of which she purchased other real estate, which would of course be also held for her own separate use, was not entitled to dispose of this newly acquired property. It seems to me that these authorities proceed on the very point and decide it, unless they have themselves been overruled by subsequent cases.

The doctrine of Courts of Equity, in relation to a wife's separate estate, is founded on this, that they will protect the wife's separate property from the power of the husband; but the husband never could dispose of the wife's fee-simple property without her concurrence, beyond his life interest; and, therefore, the reason and principle of the *dicta* and decisions respecting separate estate have no application to property of which the wife is seised in fee. That reason and that principle are given with accuracy in *Tullett v. Armstrong* (c):—"The estate for separate use, as sanctioned by

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ADAMS  
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Judgment.

(a) 2 Ves. 192.

(b) 2 Lord Kenyon, pt. 2, p. 85; S. C., 9 Sim. 447, n.

(c) 1 Beav. 1; vide p. 22.

1860.

*Chancery.*ADAMS  
v.

GAMBLE.

*Judgment.*

Courts of Equity, has its peculiar existence only in the married state. It operates as a protection to a married woman, against the legal power over a wife's property, which is vested in her husband; it acts in contravention and control of the legal right of the husband; and, as against his legal power, it is a sufficient protection; but the power of alienation remaining in the wife, the separate estate unfettered is no protection against the moral influence of the husband." Now, it will be observed, that that passage has no application to the destination of the property after the death of the wife. Another case was referred to—*Harris v. Mott* (a), which, although not an express decision of the point, goes in the same direction; it was the case of an estate in fee devised to a *feme covert* for her separate use. She entered into a contract for sale, and died, having devised the estate to her husband, who sued the purchaser for specific performance, which the Court refused to decree, thinking the case too doubtful to enforce the title upon a purchaser. So far as that case goes, it is in confirmation of the doctrine laid down in the earlier cases. Then in this country we have the observations made in *Newcomen v. Hassard* (b), by the Master of the Rolls, who says:—"The only case, of which I am aware, in which a *feme covert* to whom real estate is conveyed or devised, for her separate use, was obliged, before the statute, to convey her estate by a fine, was, where she was seised in fee; and, in such case, it has been considered that, to bind her heir, she should levy a fine, and be examined; and, since the Statute for the Abolition of Fines and Recoveries, the provisions of the sections referred to should, I apprehend, be complied with;" and then he goes on to say that the doctrine is otherwise as to estates in lands of which she is seised for life only, to her separate use. In the case of *Morris v. Morris* (c), before Vice-Chancellor Kindersley, he says that—"An absolute gift of personalty, to the separate use of a married woman, gives her the power to deal with it, independently of her husband, either by deed or will, which is not the case with respect to fee-simple and real estate." I may next mention 2 *Roper, Husband and Wife*, p. 185,

(a) 14 Beav. 169.

(b) 4 Ir. Chan. Rep. 274.

(c) 4 Drew. 38.

where it is said that—"A limitation of real estate to the wife in fee, for her sole and separate use, without more, will not enable her to dispose of it during the marriage, otherwise than by fine and recovery; because no power having been given to her by the instrument to make any disposition of the property, she can only do so by the mode prescribed by law; and, if she omit to do so, her heir will take the estate." *Doe d. Stephens v. Scott* (a) is a clear authority to the same effect, so far as a Court of Law is concerned. Thus, as I have said, the current of authority is all the same way, respecting the power of a married woman over her real estate in fee-simple, without levying a fine, or executing a deed under the statute. There are, to be sure, general expressions respecting the powers of *femes covert* over property settled to their separate use; but, when they come to be examined, they are found to relate either to personal property, to estates for life, or to the operation of deeds during the life of the woman, or to cases where there was a specific power added to the limitation. Such are the cases referred to in the note to the general statement in 1 *Sugden on Powers*, p. 206, where the writer says:—"When a married woman has property settled to her separate use, without any restraint on alienation, she is deemed a *feme sole*, and may dispose of it accordingly." For that proposition he refers to *Bell v. Hyde* (b); *Norton v. Turvill* (c); *Grigby v. Cox* (d), and *Hulme v. Tennant* (e); as to each of which some of the distinctions I have alluded to will be found to apply. So, in *Pybus v. Smith* (f), cited for the respondent, there were special powers of appointment of the estate reserved to the wife, and she was alive at the time; and, in *Tullett v. Armstrong* (g), the estates were only given to the lady for her life.

The case of *Power v. Bailey* (h) was also much relied on by the Counsel for the respondent, as an express decision in their favour; but, on examination, it will be found to admit of the same distinc-

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(a) 4 Bing. 505.

(b) Prec. Ch. 328.

(c) 2 P. Wms. 144.

(d) 1 Ves. 517.

(e) 1 Bro. C. C. 16; S. C., 1 W. & Tu. L. Cas. 394.

(f) 3 B. C. C. 340.

(g) 1 Beav. 1.

(h) 1 B. & B. 49.

1860.  
*Chancery.*  
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 Judgment.

tion. The estates of the wife were vested in trustees, for her sole and separate use, and so that she should have full power and dominion over the same. The wife granted an annuity (reciting her power over the property); and it was held binding on her second husband, she herself, however, being alive at the date of the decree. *Stead v. Wilson (a)* was a case of a life estate only in the wife.

The respondents, however, mainly relied on the case of *Baggott v. Meux (b)*, as actually deciding and settling this question. The point decided in it was that, on a devise in fee to a *feme covert*, for her separate use, a restraint against alienation could be imposed during the coverture; and it was argued from this that the case imported that, without such a clause, an absolute right of alienation in fee would exist. The case decides no such proposition. The alienation actually made was held void as against the wife, who was living at the time of the decision; and the whole import of the decision is no more than this, that, so far as the devise gave her power to deal with the estate as a *feme sole*, so far a restriction on alienation might be imposed: but as by law, on all the authorities I have referred to, she could not dispose of such an estate in fee-simple as a *feme sole*, the restriction on alienation would be unnecessary or inapplicable, and would be limited to that which she had the power to do, though, within that range, it would be valid enough. The observations of Lord Lyndhurst, in giving judgment, may be considered as implying that his opinion would be in favour of the respondent here; but the point was not strictly before him; and, whatever may be the tendency of modern decisions to enlarge the position or power of a *feme covert*, as to her separate estate, and the import of general expressions I have alluded to, I cannot consider the apparently settled doctrine to which I have adverted as shaken or overruled. If it is to be so dealt with, it must be by higher authority than mine. I must, accordingly, make a decree in favour of the petitioner; and, as this is a mere ejectment suit, the decree must be with costs.

(a) 2 Beav. 245.

(b) 1 Col. 138; S. C., on appeal, 1 Phil. 627.

Declare that the deed of the 23rd day of May 1835 was inoperative to pass any estate or interest in the premises therein comprised; and that the petitioner, as heir-at-law of Isabella Gamble, otherwise Adams, is now entitled to the premises demised by the lease of the 10th of April 1791; and let an injunction (if necessary) issue, to put the said petitioner into the possession thereof. Refer it to the Master to take an account of the rents and profits of the said premises in the said lease comprised, from the death of the said Isabella Gamble, in the month of February 1842, after all just credits and allowances; and let the respondent pay to the petitioner the amount which the Master shall so find due, within one month from the date of the Master's report, together with the costs of the suit, up to and including this hearing; and let the costs of the account in the Master's office be in the discretion of the said Master.

1860.  
*Chancery.*  
ADAMS  
v.  
GAMBLE.  
Order.

*General Hearing Book, 26, f. 347.*

1860.  
Ch. Appeal.

**Court of Appeal in Chancery.**

**In re FITZGERALD'S ESTATE;  
Ex parte ANDREW COMYN, *Appellant*.**

*April 24.*

In an affidavit filed under the provisions of the 6th section of the 13 and 14 Vic., c. 29, for the purpose of converting a judgment into a mortgage, a description of the defendant's last known place of abode, as "late of the town of Galway, but now of the county of Dublin," was held insufficient, as being too vague.

The same affidavit stated the amount of the judgment to be £894, and £3. 2s. 8d. for costs; whereas the sum mentioned for costs on the record was £2. 2s. 8d., the fee of £1 for registration having been added to the costs in the affidavit.—*Held*, to be such a variance as invalidated the affidavit.

*Statement.*

FRANCIS FITZGERALD, who was possessed of certain leasehold premises in the town of Galway, executed a bond and warrant, conditioned for the payment of £700, upon which a judgment was entered in Hilary Term 1840. The judgment was registered in 1845, and re-registered on the 21st of July 1856, it having, in 1854, become vested in the appellant.

In 1856, Patrick M. Lynch obtained a judgment against Francis Fitzgerald, in the Court of Common Pleas, for the sum of £894. 10s. 10d., besides £2. 2s. 8d. costs, and registered the same as a mortgage, under the provisions of the 13 & 14 Vic., c. 29.

Francis Fitzgerald died in 1857; and, on the 8th of March 1859, Patrick M. Lynch filed a supplemental affidavit, under the provisions of the 21 & 22 Vic., c. 105.

John Redington had obtained a judgment against Francis Fitzgerald, in Trinity Term 1855, and registered the same as a mortgage on the 25th of October 1855; but the affidavit was defective, in not containing a substantive statement of the plaintiff's last known place of abode. The estate of Francis Fitzgerald was sold in the Incumbered Estates Court on the 8th of April 1859; and upon the settlement of the final schedule of incumbrances, Judge Hargreave ruled that the supplemental affidavit filed by Patrick M. Lynch was invalid, having been sworn subsequently to the death of the conusor; but that his original affidavit was sufficient, and that his judgment was, therefore, entitled to be paid in priority to the judgment of the appellant.

From that decision the present appeal was brought, upon the grounds, among others, that the affidavit originally filed by Patrick

M. Lynch was defective: firstly; because it did not contain any sufficient averment of the defendant's last known place of abode; secondly; because the sum of £3. 2s. 8d., mentioned therein as having been recovered for costs, did not correspond with the record, upon which the sum for costs appeared to be £2. 2s. 8d.

Lynch's original affidavit ran as follows:—

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*Ch. Appeal.*  
*In re*  
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ESTATE.  
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*"Common Pleas.*

<p>"Patrick Mark Lynch, of Renmore-lodge, in the county of the town of Galway, Esq., Francis Fitzgerald, late of the town of Galway, but now of the county of Dublin,</p>	}	<p>Patrick Mark Lynch, of Ren- more-lodge, in the county of the town of Galway, Esq., aged thirty years and upwards, the</p>
Plaintiff;		
Defendant.		

plaintiff in this cause, maketh oath and saith that the defendant, by his name and description of Patrick Mark Lynch, of Renmore-lodge in the county of the town of Galway, Esq., did, on the 27th day of February, in the year of our Lord 1856, and in or as of Hilary Term, in the said year of our Lord 1856, obtain a judgment in Her Majesty's Court of Common Pleas in Ireland, against Francis Fitzgerald, late of the town of Galway, but now of the county of Dublin, the defendant in this cause, by the name and description of 'Francis Fitzgerald, late of the town of Galway, but now of the county of Dublin,' for the sum of £894. 10s. 0d. sterling, besides £3. 2s. 8d. for costs, as by the records of said Court may more fully appear. This deponent further saith that, to the best of deponent's knowledge, information and belief, the said defendant in this suit is, at the time of swearing this affidavit, seised and possessed of, or has disposing power, which he may, without the assent of any other person, exercise for his own benefit, over and issuing out of certain tenements, hereditaments and premises hereinafter mentioned; that is to say.—[Here followed a description of the lands sought to be affected.]—Deponent further saith that the sum of £894. 10s. 0d., besides the sum of £3. 2s. 8d. for costs, aforesaid, so secured by said judgment, as aforesaid, with interest thereon, still remains justly due and owing to this deponent, on foot of said judgment, over and above all just and fair allowances, and that said judgment is still in full force, virtue and effect in law."



## SUPPLEMENTAL AFFIDAVIT.

*"In the Court of Common Pleas."*

1860.  
*Ch. Appeal.*  
*In re*  
**FITZGER-**  
**ALD'S**  
**ESTATE.**  
 —  
*Statement.*

"Patrick M. Lynch, of Renmore, in the county  
 of the town of Galway, Esq., Plaintiff;  
 Francis Fitzgerald, late of the town of Galway,  
 but now of the county of Dublin, Esq.,  
 Defendant.

And the Acts of 13 & 14 Vic., c. 29, and the  
 21 & 22 Vic., c. 105.

Patrick Mark Lynch, of  
 Renmore, in the county of  
 the town of Galway, Esq.,  
 aged forty years and up-  
 wards, the plaintiff in

the cause in the title hereof named, and hereinafter mentioned, maketh oath and saith that that he this deponent obtained a judgment in said cause on the 27th day of February 1856, in or as of Hilary Term 1856, in Her Majesty's Court of Common Pleas in Ireland, against Francis Fitzgerald, late of the town of Galway, Esq., the defendant in said cause, in the title hereof named, and hereinafter stated, for the sum of £894. 10s. 0d. sterling, besides £3. 2s. 8d. for costs, as by records of said Court may appear. Saith that the cause in which he obtained said judgment is entitled 'Patrick Mark Lynch, of Renmore, in the county of the town of Galway, Esq., plaintiff; and Francis Fitzgerald, late of the town of Galway, but now of the county of Dublin, Esq., defendant.' Saith that the deponent is an Esquire, and that his present and usual place of abode is at Renmore, in the county of the town of Galway; and saith that the said Francis Fitzgerald, the defendant in said cause, and the person whose estate is intended to be affected by the registration of this affidavit, is now deceased, and was an Esquire, and that his usual and last known place of abode was at George's-place, in the county of the city of Dublin; and saith that the name 'Patrick Mark Lynch' is the plaintiff in said cause, and the party who obtained said judgment is the deponent's proper name. This deponent further saith that, to the best of his knowledge and belief, the said Francis Fitzgerald was, at the time of the entering and registering of the said judgment, and at the time of his death, seised or possessed, at Law or Equity, of, or had disposing power which he might, without the assent of any other person, have exercised for his own benefit, over certain lands, tenements, hereditaments and premises, hereinafter mentioned.—[Here followed the description of the lands.]—Saith that the sum so secured by the said hereinbefore

mentioned judgment, besides interest, and £3. 2s. 8d., for costs, still remains justly due and owing to the deponent; and saith that said judgment is still in full force, virtue and effect in law.—Sworn," &c.

Mr. *Brewster* (with Mr. *Sherlock*), for the appellant.

The 13 & 14 *Vic.*, c. 29, gave to judgment creditors the power of converting their judgments into mortgages, by filing the affidavit prescribed by the 6th section. This was the first legislative enactment, in this country, which gave a creditor the power of transferring to himself the lands of his debtor, without any notice to the latter, or any act done by him in that respect. While conferring on the creditors this enormous power, the Legislature has most properly guarded the rights of the debtor, by requiring a very particular and precise form of affidavit to be filed, and the Courts of Law have strictly construed such affidavits: *M'Dowell v. Wheatley* (a); *Crosbie v. Murphy* (b). Lynch's affidavit is defective, because it does not contain any positive averment of the defendant's last known place of abode; or if it does, the averment is insufficient on account of its vagueness. The affidavit is also defective in not stating correctly the amount of the sum recovered for costs. It may be that the place of abode mentioned conveys sufficient information, but that is not the question. In *M'Dowell v. Wheatley*, Monahan, C. J., is reported to have said (c), "If an Act of Parliament requires that a particular thing shall be done in a particular way, for a particular object and purpose, it is not for a Court of Law to inquire whether the same object might not be attained another way." The description "now of the county of Dublin" is entirely too vague, it might nearly as well have been "now of the kingdom of Ireland." In *Fonblanque v. Lee* (d), it was held that where, upon the registration of a bill of sale, the affidavit required by the Bill of Sale Act (17 & 18 *Vic.*, c. 55) omitted the description of the residence and occupation of one of the attesting witnesses to the bill of sale, the bill of sale was, by reason of such omission, rendered void as against an execution

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Ch. Appeal.  
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(a) 7 Ir. Com. Law Rep. 562.

(b) 8 Ir. Com. Law Rep. 301.

(c) p. 569.

(d) 7 Ir. Com. Law Rep. 550.

1860.  
*Ch. Appeal.*  
*In re*  
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 ———  
*Argument.*

creditor. This defect of vagueness could not be cured by the supplemental affidavit; for the 21 & 22 *Vic.*, c. 105, under whose provisions such supplemental affidavits are filed, was never intended to give any power to remedy substantial defects; it merely gives him power of stating by substantive averment that which in the original affidavit had been stated by way of recital.

The sum stated in the affidavit as recovered for costs is £3. 2s. 8d.; the sum mentioned on the record is £2. 2s. 8d. This is a distinct variance. The amount of variance is immaterial; there is, in fact, therefore, no such judgment on the the record as that mentioned in the affidavit. The proper plea would be *non tiel record*.

Mr. P. J. Blake and Mr. M. Morris, for P. M. Lynch.

The place of abode is stated in this affidavit with as much precision as was possible under the circumstances.—[The Lord CHANCELLOR.—It is not stated at all. "Of the county of Dublin" is no description of the place of abode, within the meaning of the Act. It might nearly as well have described him as of England, Ireland, or Scotland. A man's place of abode means where he may be found.]—In *M'Dowell v. Wheatley* there was no positive averment of the place of abode at all, there was only an averment by way of recital; that is not so here: there is a positive averment, and it is submitted that that averment is sufficient. *Fonblanque v. Lee* is not analogous, for the Bill of Sales Act requires greater accuracy as to the residence of parties, in consequence of the liability of traders to bankruptcy. In *Haslope v. Thorne* (a), it was held that, in an affidavit to hold to bail, the plaintiff's clerk might state his abode to be the office where he was employed during the greater part of the day, though at night<sup>b</sup> he used to sleep at another place.

As to the objection that the affidavit does not correctly state the sum recovered for costs, the 13 & 14 *Vic.*, c. 74, s. 10, says, that upon the lodgment of any memorandum for the registry of any judgment in the office for the registry of judgments, the Regis-

(a) 1 M. & S. 103.

trar shall give a certificate of such registry, with a reference to the books of the office. The 102nd General Order (1854) provides that "the Master, in awarding the costs of a judgment, shall, on production of the certificate of the registration of such judgment, under the 13 & 14 *Vic.*, c. 74, add to the costs therein the sum of one pound, as and for the costs of such registration." The 11th section of the 13 & 14 *Vic.*, c. 74, enacts, "That all costs properly incurred in the registration of judgments shall be allowed on taxation of costs, and be added to and charged and recoverable in like manner and together with the amount of the judgment so registered." Therefore, the one pound for registration forms part of the costs recovered, and are properly included in the words "moneys ordered to be recovered," &c. But it is submitted that it was not necessary to state in the affidavit the amount of the costs at all. The 6th section of the 13 & 14 *Vic.*, c. 29, enacts that the affidavit shall state "the amount of the debt, damages, costs or moneys, recovered or ordered to be paid by such judgment, decree, order, or rule;" *redendo singula singulis*, the word "costs" refers only to costs recovered for a decree, order, or rule.

Mr. *Sullivan* and Mr. *Beytagh*, for Reddington.

In *Blackwell v. England* (a), it was held that, where a bill of sale was attested by a witness described as "clerk to Messrs. Brundrett and Randall, solicitors, Temple," the fact being that he spent his business hours there, but took his meals and slept elsewhere, the description of residence was held sufficient. In that case, Erle, J., in his judgment said, (p. 549), "I am happy to say that the sound principle of common sense on which we decide in construing this Act is no novelty. In *Haslope v. Thorne*, Lord Ellenborough said that the words place of abode did not necessarily mean the place where the defendant sleeps; that the object of this rule of Court was to ascertain the place where the deponent was most usually to be found, which in the present case was the office in which he was employed during the greater part of the day, and not the place whither he returned for the

(a) 8 Ell. & B. 541.

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 ———  
*Argument.*

purpose of rest. The rule of construction is the same, whether it be a rule of Court, or an Act of Parliament." In *Wills v. Adey* (a), "of the parish of Fisherton Anger, on the list of voters for the said parish of Fisherton Anger," was held a sufficient description of the defendant's place of abode, under the Voters Act; and in *Osborne v. Gough* (b), "of Birmingham" was held a sufficient description of the place of abode of the attorney whose name was indorsed on the notice of action.

Mr. *Sherlock* replied.

The LORD CHANCELLOR.

*Judgment.*

The affidavits, upon the validity of which we have now to decide, purport to be framed in accordance with the requirements of an Act of Parliament which specifies very fully the matters which such affidavits ought to contain. Upon the construction of that Act of Parliament there have been already some important decisions, all tending to establish that the matters which are required, by the Act, to be stated, must be stated by positive averment, upon the oath of the party making the affidavit. The 21 & 22 *Vic.*, c. 105, was, no doubt, introduced by the Legislature as a remedial enactment; but, as far as the present question is concerned, that Act only enables the party, by means of a supplemental affidavit, to convert into matter of positive averment matters which have been introduced by way of recital into the original affidavit. In the case now before us there can be no doubt whatever as to the invalidity of Mr. Reddington's affidavit, inasmuch as it does not contain any averment pledging his oath to the fact of Fitzgerald's last known place of abode; it merely states the facts which are embodied in the description of the judgment.

As to Lynch's affidavit the case is somewhat different. It does contain a statement amounting to an averment, that Fitzgerald was "late of the town of Galway, and now of the county of Dublin;" "now" meaning the time of swearing the affidavit. That he was

(a) 2 C. B. 246.

(b) 3 B. & P. 550.

of the town of Galway was quite true ; and all the authorities which have been referred to establish that such a description would amount to an averment that that was his place of abode. The Acts, upon the construction of which those cases were respectively decided, required that the place of abode of the party (or of his attorney, in some cases) should be averred, and were held, in the respective decisions, to be satisfied by stating the person to be "of" such a place. There have been also several decisions as to the certainty or vagueness of the place of abode assigned ; from which it appears that, whether stating a party to be "of London," or "of Westminster," be sufficient or not, having regard to the great extent of these respective places, there can be no doubt that stating him to be "of Birmingham," or "of Bolton-in-le-Moore," is sufficient. If, then, this part of Lynch's affidavit had stopped at the words "late of the town of Galway," it would have been hard to say that that was not a sufficient description of his last known place of abode. It may be questioned whether Fitzgerald did, in fact, acquire any place of abode, within the meaning of the Act, after he left Galway ; but Lynch has established, by his affidavit, that he did ; for in it he describes himself as "now of the county of Dublin," which imports that he had acquired a place of abode in the county of Dublin. Now I am quite clear that "now of the county of Dublin" is not a sufficient description of a party's place of abode. It is quite too vague ; and, as the entire averment shows that the town of Galway was not his last place of abode, it follows that the affidavit is defective in this respect. It is plain that the party did not intend to practise any deceit or fraud ; and it is, no doubt, to be lamented that parties endeavouring to do right should be hampered by the requirements of the Act of Parliament ; but, on the other hand, it must be remembered that this Act enables judgment creditors, by means of such affidavits, to convert their judgments into mortgages, and thereby transfer to themselves the estates of their debtors ; and the Legislature has properly guarded the rights of the debtors, by requiring an exact and particular form of affidavit.

There is another matter as to which Lynch's affidavit is defective ; the amount recovered by the judgment, as stated in the affidavit,

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does not correspond with the amount appearing on the record. I have again to regret that a party should be thus embarrassed by the statute, when he endeavours to comply with its requirements ; but he has done so in a way which will not allow us to assist him in his difficulty. The original sum recovered by the judgment is correctly stated, but the affidavit states that there was also recovered a sum of £3. 2s. 8d. for costs. When the record is produced, it appears that the additional sum recovered was not £3. 2s. 8d., but £2. 2s. 8d., and that it was recovered, not as costs, but as damages for the detention of the debt. Now, in this point of view, £1 is of as much importance as £100 ; and, although the party intended to do what was right, he has not, in point of fact, complied with the requirements of the statute, and his affidavit is accordingly defective.

The order of the Court below must be reversed.

#### THE LORD JUSTICE OF APPEAL.

I entirely concur in the view taken by the LORD CHANCELLOR, and in his reasons. The appellant in this case and Mr. Lynch are, the one a creditor by judgment, of the year 1840, and the other a like creditor, of the year 1856. The latter contends that, by registration, he has acquired a prior title, and become a mortgagee. In order to establish this priority, and thereby postpone the prior creditor, it is incumbent on him to prove a strict compliance with the provisions of the statute, which is the indispensable condition of acquiring the right and benefit it is meant to confer. The Court is, accordingly, bound to see that all that the statute requires has been complied with, otherwise it is impossible that the prior title can be displaced or postponed. Now we have both judicial and legislative authority for exacting a precise adherence to all its conditions. The facts it requires must be stated positively and explicitly ; recitals or inferences cannot be substituted for them ; nor can the want of them be excused on the ground of their being immaterial, or by arguing that their absence may be supplied by equivalent matters. The decisions of the Court of Common Pleas, in *Fonblanque v. Lee* and *McDowell v. Wheatley*, followed by the

Act of Parliament for remedying defective registrations, preclude us from yielding to any such considerations, and from dispensing with a strict compliance with all or any of the conditions to which I refer. Now I think these conditions have not, in several respects, been observed in the present case. The affidavit does not state the last known place of abode of the debtor; for although it might have been sufficient to have said, "late of the town of Galway," that place of abode appears to have been abandoned, and "the county of Dublin" substituted for it; this is not, in my opinion, a description of the place of abode, such as to comply with the requisition of the statute.

The last objection is, that there is a variance between the affidavit of registry and the judgment of record. That this variance exists cannot be denied, and the defence against it amounts to no more than assertion of its immateriality. Now, it is true that the difference between the amounts of the sums in the affidavit and in the judgment is very small, and, I dare say, the greater sum could be recovered by execution; but still the variance exists. The two things are not identical; and whether the difference be a difference of £1 or of £1000, yet the fact is, that the judgment of record is not the same as that described in the affidavit of registration.

The affidavit, and consequently the registration, is, therefore, invalid, and the judgment of the Court below must be reversed.

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*Judgment.*



1860.  
*Ch. Appeal.*

*In re* EDWARD SANDIFORD POWER'S ESTATE;  
JOHN TAYLOR, *Appellant.*

Nov. 12.

If an affidavit, filed for the purpose of registering a judgment as a mortgage, under the provisions of the 13 & 14 Vic., c. 29, substantially complies with the requirements of the 6th section of that statute, it is sufficient. Therefore, where such an affidavit was entitled in the same words as the record of the judgment, and stated (*inter alia*), that "J. T., the plaintiff, by the name and description of J. T., of 116 Grafton-street, in the city of Dublin, solicitor, did, on the 15th of July 1858, obtain a judgment in the Court of Exchequer, against the defendant in this cause, by the name and description of E. S. P., of, &c., . . . that the usual or last-known place of abode of the said E. S. P., the defendant in this cause, the person whose estate is intended to be affected by the registration of this affidavit, is at, &c. . . . that, to the best of deponent's knowledge and belief, the said E. S. P., the defendant in this cause, is, at the time of swearing this affidavit, seised or possessed of," &c., &c.—

*Held*—First, that the above affidavit contained a sufficient statement of the title of the cause.

Secondly; that the affidavit sufficiently identified the defendant in the judgment with the person whose estate was sought to be affected by the registration of the affidavit.

THIS was an appeal against an order made by Judge Dobbs, in the Landed Estates Court, by which he disallowed a judgment mortgage, registered by the appellant against the lands sold in this matter, upon the ground that the judgment had not been duly registered as a mortgage, under the provisions of the 13 & 14 Vic., c. 29.

John Taylor, the appellant, obtained a judgment as of Trinity Term 1858, against Edward Sandiford Power, the owner, for £3559. 12s. 4d., with £3. 3s. 0d. for costs; and on the 3rd of August 1858, registered the same as a mortgage, under the 13 & 14 Vic., c. 29. The affidavit sworn at the time of the registration was as follows:—

*"In the Court of Exchequer.*

"John Taylor, of No. 116 Grafton-street, in the city of Dublin, solicitor, Plaintiff.  
Edward Sandiford Power, of No. 7 Wilton-place, Belgrave-square, in the county of Middlesex, England, Esq., Defendant.  
And the Act of the 13 & 14 Vic., c. 29.

John Taylor, of 116 Grafton-street, in the county of the city of Dublin, solicitor, aged thirty years and up-

wards, the plaintiff in this cause, maketh oath and saith, that he, this deponent, John Taylor, the plaintiff, by the name and description of John Taylor, of No. 116 Grafton-street, in the city of Dublin, solicitor, did, on the 15th day of July, in the year of our Lord 1858, and in or as of Trinity Term, in the said year of our Lord 1858, obtain a judgment in Her Majesty's Court of Exchequer

in Ireland, against the defendant in this cause, by the name and description of Edward Sandiford Power, of No. 7 Wilton-place, Belgrave-square, in the county of Middlesex, England, Esq., for the sum of £3559. 12s. 4d. sterling, besides £3. 3s. for costs; as by the records of said Court may fully appear. This deponent further saith, that the usual and known place of abode of this deponent is at No. 116 Grafton-street, in the county of the city of Dublin, and that he is a solicitor of the Court of Chancery, and an attorney of this Honorable Court; and that the usual or last known place of abode of the said Edward Sandiford Power, the defendant in this cause, the person whose estate is intended to be affected by the registration of this affidavit, is at No. 7 Wilton-place, Belgrave-square, in the county of Middlesex, England; and that the said Edward Sandiford Power is not, to deponent's knowledge or belief, of any trade or profession, but is an Esquire. This deponent further saith, to the best of his knowledge, information and belief, the said Edward Sandiford Power, the defendant in this cause, is, at the time of swearing this affidavit, seised or possessed of, at Law or in Equity, or has disposing power, which he may, without the assent of any other person, exercise, for his own benefit, over certain lands, tenements, hereditaments and premises hereinafter mentioned; that is to say, the town and lands of B.—[Here followed the several denominations of the land sought to be affected, and the names of the baronies and counties in which they were respectively situated.]—Deponent further saith, that the sum of £1779. 16s. 2d. for debt and costs still remains justly due and owing to this deponent, upon said judgment, over and above all just and fair allowances, and that said judgment is still in full force, virtue and effect in law, not executed, satisfied, set aside, paid off or discharged.

“JOHN TAYLOR.”

The lands in question were subsequently sold in the Landed Estates Court; and on the settlement of the final schedule, before Judge Dobbs, Taylor's judgment mortgage was disallowed as an incumbrance, on the ground that the requirements of the 6th section of the 13 & 14 Vic. c. 29, had not been complied with, inasmuch as the affidavit did not contain any averment of the title of the

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*Argument.*

cause in which the judgment had been recovered, nor any averment which identified the defendant in the judgment with the owner of the lands sought to be affected by the judgment mortgage.

Against that decision the present appeal was brought.

Mr. *Brewster*, with Mr. *F. Walshe* and Mr. *Gamble*, for the appellant.

This case is quite distinguishable from *M'Dowell v. Wheatley* (a). There the affidavit did not contain any positive averment whatever of the title of the cause, nor of the last-known place of abode of the defendant. Here there is such positive averment as must, by reasonable and irresistible inference, inform anyone, reading the affidavit, of the title of the cause, and of the identity of the defendant in the judgment with the person whose estate is sought to be affected by the registration. Reasonable inference is sufficient in such cases: *Roublot v. Boutell* (b); *Blackwell v. England* (c).

Mr. *J. E. Walshe* and Mr. *Coze*, in support of the order of the Court below.

There is here no positive averment of the title of the cause sworn to; for the entitling of the affidavit is not covered by the oath. Neither is there any positive averment that the defendant in the judgment is the person whose estate is sought to be affected by the registration. The affidavit merely states that "the last-known place of abode of the said Edward Sandiford Power, the defendant in this cause, the person whose estate is intended to be affected by the registration of this affidavit, is," &c. Affidavits for the purpose of converting judgments into mortgages are strictly construed: *M'Dowell v. Wheatley*; *Crosbie v. Murphy* (d); *In re Fitzgerald's Estate* (e); *In re Ferrall* (f). The only proper form of entitling an affidavit is, A v. B: *Richard v. Isaac* (g).

(a) 7 Ir. Com. Law Rep. 562.

(b) 5 Jur., N. S., 548.

(c) 8 Ell. & Bl. 541.

(d) 8 Ir. Com. Law Rep. 301.

(e) *Ante*, p. 278; S. C., 5 Ir. Jur., N. S., 205.

(f) 5 Ir. Jur., N. S., 274.

(g) 1 Cr., M. & R. 136.

THE LORD CHANCELLOR.

The Court is perfectly satisfied that, in the affidavit now before it, all that is required by the Act of Parliament has been more than substantially complied with, and that the principle of the decision in *M'Dowell v. Wheatley* has been carried too far in the Court below, if it has been supposed to invalidate the affidavit in the present case. It has been said, during the argument, that if we hold this affidavit good, we must overrule the decision in *M'Dowell v. Wheatley*. We do no such thing. The Act of Parliament, upon which this question depends, requires, by its 6th section, that the affidavit made for the purpose of converting a judgment, order or rule into a mortgage shall contain, among other matters, an averment, upon oath, of the usual or last-known place of abode, and the title, trade or profession of the plaintiff and of the defendant. In the affidavit in *M'Dowell v. Wheatley*, there was no averment whatever of the usual or last-known place of abode of the defendant. It was there sought to help out that defect by referring to the statement that the order had been registered "against James Sadleir, by the name and description of James Sadleir, of Clonacody, Clonmel, in the county of Tipperary, Esq., M.P." But that did not cure the defect, for he might have had a last-known place of abode subsequently to the registration of the order. The Court was, in point of fact, quite right in holding that to be a defective affidavit, because there was absolutely no compliance with the requirements of the Act, in the respect mentioned; but it is entirely another question whether the Court is bound to overlook and to consider as defective every species of averment except one in the precise form, as "that the name of the cause was so and so," &c., going in detail through all the statements. For my own part, I consider the decision in this case, in the Landed Estates Court, to be extremely unsatisfactory. What is required by the Act to be stated in the affidavit? The name or title of the cause, the Court in which the judgment has been obtained, the date of the judgment, and the names and the usual or last-known place of abode, and the title, trade or profession of the plaintiff and of the defendant, and the amount of the debt recovered by the judgment. Well, in the

1860.  
*Ch. Appeal.*  
*In re*  
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ESTATE.  

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Judgment.

1860.  
*Ch. Appeal.*  
*In re*  
**POWER'S**  
**ESTATE.**  


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*Judgment.*

affidavit before us, the Court is stated to be the Exchequer; the date of the judgment to be the 15th of July 1858. The names and description of the plaintiff and defendant are sworn to be—[Here the LORD CHANCELLOR read the description in the affidavit]—and the amount of the judgment to be £3559. 12s. 4d. The question is, has the title of the cause been sufficiently stated? There are two different ways in which this might have been done. One was by an independent substantive averment, that the name of the cause in which the judgment was recovered was so and so; but another method of averring the title of the cause was, by stating, as in the affidavit before us, that the judgment in question was recovered by John Taylor, by the name and description of, &c., against the defendant in this cause, by the name and description of Edward Sandiford Power, of, &c. The affidavit, therefore, states the names and descriptions of the parties who must have been the parties to the cause in which the judgment was recovered, and whose names and descriptions would have constituted the title of that cause; for the practice is, that a judgment is headed by the names of the parties to the cause in which that judgment was recovered, and no other title of it would be right. Therefore the present is a fair statement, on the part of the plaintiff, that the title of the cause, in which the title sought to be registered had been recovered, was “my name and description against your name and description.” It appears to me that, without deducing any inference, and by mere reference to the legal practice, that that is the title of the cause.

The next objection that has been made to the form of this affidavit, I confess I find great difficulty in comprehending; namely, that there is nothing in the affidavit to identify the defendant in the judgment with the owner of the lands sought to be affected by the registration. The point of that objection, I presume, is, that instead of saying “that the person whose estate is intended to be affected is seised or possessed,” &c., the deponent states, “that Edward Sandiford Power, the defendant in this cause, is seised or possessed,” &c. Now, it is to be observed that the title of the cause, as set forth in the margin of the affidavit, corresponds with

the title of the cause in which the judgment was recovered, as averred in the body of the affidavit. Had this not been so, there would have been an ambiguity, but, as it is, there is none; the affidavit itself shows that the title in the margin was the title of the judgment; and, therefore, "the defendant in this cause" is the same person as the defendant in the judgment, who is thus identified with the owner of the lands sought to be affected.

The Judge in the Landed Estates Court has, perhaps, been disposed to follow the decision in *M<sup>r</sup> Dowell v. Wheatley* too rigorously. I think that, in the present case, the affidavit substantially contains every statement required by the Act of Parliament, and is, therefore, valid. Accordingly, the decision of the Court below must be reversed, and this incumbrance held to be good.

THE LORD JUSTICE OF APPEAL concurred.

In re the Estate of

E. M. EDGEWORTH, *Owner and Appellant*;

D. M. DAVIS, *Respondent*.

THIS was an appeal on behalf of the owner, against an order made by Judge Dobbs, in the Landed Estates Court, by which he had ruled that a judgment obtained by the respondent against the appellant in 1867, and subsequently registered by him as a mortgage, under the provisions of the 13 & 14 *Vic.*, c. 22, was an incumbrance on the lands sold in this matter.

Mr. *Sherlock* and Mr. *G. O'Malley*, for the appellant, contended that the affidavit filed by the respondent, for the purpose of converting his judgment into a mortgage, was defective, because it

for registry.—*Held* that the above was not such a variance as would invalidate the affidavit.

1860.  
*Ch. Appeal.*  
*In re*  
POWER'S  
ESTATE.  
*Judgment.*

Nov. 13.

An affidavit registered under the 13 and 14 *Vic.*, c. 20, s. 6, stated that the sum recovered by the judgment was £265, with £3. 2s. 8d., for costs. The record of the judgment stated that the sum recovered was £265, besides £2. 2s. 8d., for damages, and £1.

1860.  
*Ch. Appeal.*  
*In re*  
 EDGEWORTH'S  
 ESTATE.

*Argument.*

stated that a sum of £3. 2s. 8d. had been recovered for *costs*, whereas the record of the judgment stated that £2. 2s. 8d. had been recovered for *damages*, and £1 for the costs of registration; and that this was such a variance as invalidated the affidavit. They cited *In re Fitzgerald's Estate (a)*.

Mr. *Brewster* and Mr. *A. Graydon*, for the respondent.

It is sufficient if the affidavit state the *amount* of the "damages, costs," &c. Here the sum stated in the affidavit is the same as that appearing on the record.

*Per Curiam.*

*Judgment.*

There is not any substantial variance in this case. The amount stated is the same in the affidavit and on the record. In the case of *In re Fitzgerald's Estate* the sum mentioned in the affidavit was not the same with the sum appearing on the record. The order of the Court below must be affirmed.

(a) *Ante*, p. 278; S. C., 5 Ir. Jur., N. S., 205.

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In re the Estate of  
 E. M. EDGEWORTH, *Owner and Appellant*;  
 THOMAS R. SMITH, *Respondent*.

Nov. 12.

In an affidavit registered under the 13 and 14 Vic., c. 29, s. 6, a statement "that deponent was, and still is, a gentleman," was held to be a sufficient description of the plaintiff, where he had not any trade or profession.

THIS was an appeal on behalf of the owner, against an order made by Judge Dobbs in the Landed Estates Court, by which he had ruled that a judgment obtained by the respondent against the appellant in 1857, and subsequently registered as a mortgage, was an incumbrance on the lands sold in this matter.

Mr. *Sherlock*, for the appellant, contended that the affidavit registered by the respondent, for the purpose of converting his

judgment into a mortgage, under the provisions of the 13 & 14 Vic. c. 29, was invalid, upon the ground (among others) that it did not contain a sufficient description of the plaintiff. The affidavit contained, as a description of the plaintiff, the following statement, "that deponent was, and still is, a gentleman." That is not a sufficient description to satisfy the requirements of the 6th section of the Act, which enacts that the affidavit shall set forth "the title, trade or profession of the plaintiff." It cannot be inferred that the plaintiff meant to make averment of his title by stating that he was a gentleman.

1860.  
*Ch. Appeal.*  
*In re*  
EDGEWORTH'S  
ESTATE.  
*Argument.*

Mr. *Lawson* and Mr. *Cathrew*, for the respondent, were not heard.

*Per Curiam.*

It does not appear that the plaintiff had any trade or profession; and in that case it is difficult to conceive how he could better have described his title than he has done. This affidavit is good, and the order of the Court below must be affirmed.

*Judgment.*

In re the Matter of the Estate of

EDWARD SANDIFORD POWER, *Owner*;

FRANCIS CARLETON REEVES, *Petitioner*.

Nov. 11, 12.

THIS was an appeal on behalf of F. C. Reeves, against an order made by Judge Dobbs in the Landed Estates Court, disallowing a judgment mortgage as an incumbrance upon the lands sold in this matter.

The owner of an estate sold in the Landed Estates Court was held to be estopped from objecting, upon the set-

tlement of the final schedule of incumbrances, to a claim which he had admitted, in his affidavit filed as an answer to the conditional order for sale, to be a charge upon the estate. He had also suffered the conditional order to be made absolute, and a sale to be had, without disputing the claim in question.

An incumbrancer cannot avail himself of an objection filed by another party to the validity of a claim, to which he has not himself filed an objection.



1860.  
*Ch. Appeal.*  
*In re*  
 POWER'S  
 ESTATE.  


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*Statement.*

In Easter Term 1857, F. C. Reeves obtained a judgment against the owner, which he registered as a mortgage on the 27th of April following. In 1858; F. C. Reeves filed a petition in the Landed Estates Court for a sale of the lands. A conditional order for a sale was made, and served on the owner, who filed an affidavit as cause against the conditional order, in which he stated that he had made arrangements to raise money to discharge all the incumbrances affecting the lands, including the debt due to F. C. Reeves. The conditional order was subsequently made absolute, and registered as a *lis pendens*.

The lands were sold; and, on the settlement of the final schedule of incumbrances, the owner objected to F. C. Reeves' claim, on the ground that the affidavits filed for the purpose of registering his judgment as a mortgage were defective. Judge Dobbs ruled that the registration of Reeves' judgment was invalid, and that his claim should be disallowed. From that decision F. C. Reeves now appealed. No other party had, on the settlement of the schedule, filed a petition to Reeves' claim; but Margaret Kirwan, a *puisne* incumbrancer, had filed an answer to Reeves' appeal, with which she had been served, and now claimed to be heard in support of the order of the Court below.

*Argument.* Mr. *Brewster*, Mr. *Warren*, and Mr. *R. Reeves*, for the appellant. The owner cannot be now heard against this judgment mortgage; he should have taken his objection *in limine*. He has acknowledged the debt in his affidavit showing cause against the conditional order for a sale, and he cannot now turn round and say that it is not a debt. He has even allowed the conditional order to be made absolute, and a sale to be had, without taking any steps to stay the proceedings on the ground of the invalidity of this claim. He is now stopped.

Mr. *Flanagan* and Mr. *Coxe* appeared for the owner.

The LORD CHANCELLOR.

*Judgment.* We must hold the owner concluded by his own affidavit. He cannot admit and deny the same thing; what he has sworn must be

taken to be true as against himself. It is a most mischievous practice to allow a party who, when a conditional order for a sale has been obtained, swears to a particular incumbrance, and suffers the proceedings to go on, then to turn round and say "oh! this is not an incumbrance at all." I remember a case in the Court of Exchequer, in which the bill alleged a certain sum to be due on foot of a judgment, and the respondent by his answer admitted that it was, but on taking the account he endeavoured to show that a less sum was due; and he was held to be estopped by his own admission.

1860.  
*Ch. Appeal.*  
*In re*  
POWER'S  
ESTATE.  
*Judgment.*

THE LORD JUSTICE OF APPEAL.

Suppose the party had endeavoured to impeach the original decree; he could have done so only by a proceeding in the nature of a bill of review, and should have shown that he had not known the facts upon which he subsequently relied, and had not, at the time, the means of knowing them.

Mr. Serjeant *Sullivan*, Mr. *P. J. Blake* and Mr. *M. Morris*, for Mrs. Kirwan, contended that, as she had been served with this appeal and had filed an answer, she was now entitled to be heard, an objection to the claim having been filed, though not by her.

Mr. *Brewster*.—If Mrs. Kirwan intended to dispute this claim, she should have filed an objection herself. An incumbrancer cannot take advantage of an objection filed by another party. This appears from the 38th of the General Rules of the Landed Estates Court.

Mr. Serjeant *Sullivan*.—It would be a ruinous practice if it were necessary that a number of incumbrancers, who wished to dispute a particular claim, should be obliged to file separate objections, and not be allowed to avail themselves of an objection filed by one. It has always been the practice of the Incumbered Estates Court that any incumbrancer might avail himself of an objection filed by any other incumbrancer, which went to the root of the claim. This lady has been led astray by what is regarded as the settled practice of the Court. She ought, at all events, to be allowed to file an objection *nunc pro tunc*.

1860.  
*Ch. Appeal.*  
*In re*  
**POWER'S**  
**ESTATE.**  
*Judgment.*

The LORD CHANCELLOR.

The Rules of the Landed Estates Court are against Mrs. Kirwan; and if the practice of the Court is in contravention of the Rules, it is wrong. We hold this judgment mortgage well charged, because the only objection filed was that of the owner, and he is estopped. No party can avail himself of an objection which he has not filed himself. The order of the Court below must be reversed.

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In re the Estate of KENNEDY, *Owner*;  
 CRUISE, *Petitioner*.

Nov. 12.

The three months within which an appeal from an order or decision of the Landed Estates Court must be entered, in accordance with the 41st section of the Landed Estates Act (21 and 22 Vic., c. 72), are to be computed exclusive of the day of the date of such order or decision, and inclusive of the day on which the appeal is entered.

THIS was an appeal on behalf of the petitioner, against an order made by a Judge of the Landed Estates Court.

Mr. *M. Morris* raised a preliminary objection. This appeal is too late. By the 41st section of the Landed Estates Act, an appeal "must be entered within three months from the date of the decision or order." In this case the order bears date the 21st of June; the appeal was entered on the 21st of September. It should have been entered on or before the 20th of September.

Mr. *William Smith*, for the appellant.

The 2nd of the General Orders of the Court of Chancery (1843) provides "That when time is to be computed by days, it shall be exclusive of holidays; and when it is to be computed by the month, it shall be construed calendar month; and in all cases it shall be exclusive of the first, and inclusive of the last day, unless the last day be a holiday, when the following day shall be included."

The LORD CHANCELLOR.

I apprehend this appeal is in time.

1861.  
*L. E. Court.*

**Landed Estates Court.**

In the ESTATE of CHARLES HUNT,  
*Owner and Petitioner.*

Jan. 23.

THE question in this case arose on the hearing of the final schedule of incumbrances. As the facts appear at length in the judgment, it is only necessary to state that Anne Wallace, whose claim was No. 7 on the schedule, was assignee from Miss Anne Pfeilitzer, of the sum of £1825, moiety of a charge of £3650; and which, by a final decree in the cause of *Pfeilitzer v. Hunt*, was declared well charged on the estates the subject of the petition in this matter. Miss Anne Wallace became assignee after the date of the final decree. The point was raised by the Judge himself, who considered that the rights of the minors had been overlooked in the Chancery proceedings, and directed the case to be argued on their behalf.

Although a Judge of the Landed Estates Court will not act in opposition to, but is bound by, a final decree in Chancery—[See *In re Lanauze*, 11 Ir. Chancery Rep. 19]—yet where it appears that the rights of minors have been prejudiced by such decree, the Court will retain the purchase-money, to enable the minors to obtain redress in Chancery.

Mr. *F. Smythe*, for the minors.

Mr. *S. Walker*, for Miss Anne Wallace.

Mr. *Ormsby*, for the owner.

LONGFIELD, J.

The facts in this case are not very complicated, and are all admitted, by all parties, without any conflict of evidence. Under the will of James Hunt, dated the 24th of July 1819, Charles Hunt (the owner in this matter), and his brother Thomas, were entitled, as tenants in common, to the lands sold in this matter, subject to some life annuities. On the 31st of December 1823, Thomas Hunt conveys his moiety to his brother Charles, in consideration of the sum of £3650, which, however, was not paid, but secured by the

Feb. 23.  
*Judgment.*

1861.  
*L. E. Court.*

*In re*  
HUNT'S  
ESTATE.

*Judgment.*

bond and warrant of Charles, on which judgment was entered as of Hilary Term 1824. It was clearly intended to remain as a lien on the estate; for, on the 1st of January 1824, on the day after his purchase from Thomas, Charles Hunt executes a settlement, on his marriage with his present wife, then Maria Pfeilitzer, by which he settles his estates, subject to the annuities given by the will of James Hunt, "and to the said sum of £3650, so secured by the said recited indentures of lease and release, of the 30th and 31st days of December 1823, as aforesaid, and to the interest which shall accrue thereon." The form of this settlement is not unimportant. It vests the legal estate in the trustees on certain trusts, one of the earliest of which is to pay the annuities, "and also the interest to accrue due in respect of the said sum of £3650, so secured by the bond and warrant;" and after those trusts the deed gives an equitable life estate to Charles Hunt, with remainder to his intended wife and children. By another deed, Maria Pfeilitzer's property is settled on the wife, then on the husband, then on the children. Maria Pfeilitzer, now Mrs. Hunt, was the sister of the petitioner Anne Pfeilitzer; and a great part of their property consisted of the residuary estate of their maternal uncle, Lucas Garvey, under his will, dated the 24th of November 1812. Mrs. Maria Hunt was administratrix with this will annexed. Her husband, Charles Hunt, got possession of the assets, and employed them in paying off the charge of £3650, and he got the judgment satisfied on the roll. In this state of facts, Miss Anne Pfeilitzer filed her cause petition, by the amended prayer of which she prays that a declaration should be made, that the said principal sum of £3650 was well charged by the said indenture of the 1st of January 1824, on the lands comprised therein, and that the petitioner was entitled to one moiety thereof. It is a common equity, where an estate is put in settlement expressly subject to a charge, if the tenant for life pays it, to keep it alive for his benefit; and, of course, if he pays it out of assets, then to keep it alive as an investment of those assets. Accordingly, by the decree of the Lord Chancellor, dated the 6th day of December 1855, it was declared that the said sum of £3650 was well charged, by the indenture of the 1st of January 1824, on the premises comprised therein,

and that the petitioner was entitled to half that charge, and the usual consequential directions were given by the decree. On that hearing the infants appeared by Counsel (Mr. *Brewster* and another), and they could not reasonably complain of the decree, which left them all that was settled on them, viz., the estate, on their parents' death, subject to a charge of £3650, to be taken out of it; of which sum, however, they would be entitled, under the settlement of their mother's property, to one moiety. The matter then was taken into the Master's office, and the infant defendants did not appear there by Counsel; and the solicitor informs me that the Master directed that they should not appear by Counsel—a sufficient intimation that their rights were not to be prejudiced by the report or its consequences. Their rights were clear, to get, on the death of their parents, the estate, or its value, *minus* the charge of £3650. Accordingly, the other parties in the same interest with the minors did not generally appear before the Master at all. There was some conflict of priorities in the Master's office, and the report is made up, dated the 18th day of December 1856, by which the Master finds that all the mortgage and judgment creditors of Charles Hunt, between the date of the settlement and the filing of the cause petition, were charges on the life estate of Charles Hunt, prior to the said charge of £3650, under the settlement. I do not understand the grounds of this report. It appears to me that the interest of the sum of £3650 was not so properly called a charge on the life estate of Charles Hunt, as a payment to be made, by the trustees, out of the rents and profits of the lands, in priority to Charles Hunt's equitable life estate. Some stress was laid on the fact that the judgment had been satisfied. That does not appear to me to be a fact of importance. The judgment was not entered up until after the marriage settlement, and was not, of its own force, a charge on the inheritance. It was a charge on Charles Hunt's life estate, and was extinguished by its satisfaction; but the interest on the £3650 was a charge antecedent to Charles Hunt's equitable life estate; and I do not see how his creditors, not having any legal estate, could remove that prior equity, nor how the report can be reconciled with the decree declaring the sum well charged by the deed of the 1st of

1861.  
L. E. Court.  
*In re*  
HUNT'S  
ESTATE.  
—  
Judgment.

1861.  
*L. E. Court.*  
*In re*  
HUNT'S  
ESTATE.  

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*Judgment.*

January 1824. The petitioner Anne Pfeilitzer may be bound by that report, as she did not except to it; but it was not intended to prejudice the infants, who were substantially not permitted to appear by Counsel in the office. The charge against them was only under the deed of 1824; and that deed made a provision for keeping down the interest during Charles Hunt's lifetime; and if the owners of the charge, or the trustee for the owners, did any act by which they were precluded from raising the interest off the life estate, they must lose that interest altogether. The right of the infants entitled to the estate in remainder to have a receiver, if necessary, put over Charles Hunt's life estate, to keep down the interest, or to compel the trustees to do so, was anterior to any interest which Charles Hunt, or his assigns or creditors, could have in the premises. The cause was then set down for final hearing, the solicitor for minors having no reason to think that the decree could possibly affect them; and none of the other parties in the same interest appearing at all when the decree of the 6th of February 1857 was pronounced, which, I think, is not consistent with the rights of the infants, or other parties entitled in remainder, or with the former decree of 1855. This decree directs the lands to be sold, and the life estate, and the inheritance after the life estate (that is, the reversionary interest), to be valued respectively, and that, out of so much of the produce of the sale as represents the life estate, the arrears of the annuities, and the several charges on the life estate, shall be paid according to their priority, and that, out of so much of the produce of the sale as shall represent the inheritance, the sum of £3650. shall be paid. I think the infant inheritors have a just complaint against this latter clause, of which the full effect, coming, as it did, by surprise, was probably not comprehended at the time by the parties. Its effect obviously is to make the remainderman pay all the interest which shall accrue on the sum of £3650 from the time of the sale, during the life of Charles Hunt. The estate for life obviously does not bear it; for its value is distributed among Charles Hunt's creditors. The owners of the charge do not lose it; for, as they get the principal now, that is

the same thing as if the charge was delayed and bearing interest; the remaindermen, therefore, bear the loss. An example in figures will show this. Suppose the life estate and the inheritance in remainder were each worth £3650, then, if the trusts of the deed of 1824 were carried fairly out, the owners of the inheritance would get, on the decease of Charles Hunt, the sum or value of £7300, subject to a charge of £3650; that is, they would get £3650 net, or, if the payment were made now, the debt would be paid out of the entire fund, and the balance settled so as to come to them at the proper time; or, instead of the whole being settled, the value set apart to represent the inheritance should be such a sum as, if put out to compound interest during the lifetime of the tenant for life, would, according to the average duration of human life, accumulate to the entire net value of the estate; but, in the case I have put, the decree would give the inheritors nothing; the entire of the £7300 would be thus spent. One sum of £3650 would be paid to the creditors of the life estate, and another sum of £3650 would go to pay the charge placed on the estate by settlement. I conceive that, supposing the Master's report to stand, the decree ought either to have directed the money that represents the value of the inheritance to be invested during the lifetime of the tenant for life, and, on his decease, the sum of £3650 to be paid, without interest, out of the accumulated fund; or it should have taken the present value of a sum of £3650, payable on the decease of Charles Hunt, and directed that sum only to be now paid out of the fund representing the inheritance. Either of these decrees would be just, and consistent with itself. The existing decree is inconsistent; for it deprives the petitioner of all past interest, and yet substantially charges all future interest against the reversionary estate. The same injustice is done by throwing all the costs upon the value of the reversionary estate. Inasmuch, therefore, as I think that the infant defendants were taken by surprise, and suffer seriously from the decree, I shall, for the present, retain the money, in order to give them an opportunity of commencing such proceedings as they may be advised to take for the purpose of obtaining redress in Chancery. If they cannot

1861.  
*L. E. Court.*  
*In re*  
 HUNT'S  
 ESTATE.  


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*Judgment.*



1861.  
*L. E. Court.*  
*In re*  
**HUNT'S**  
**ESTATE.**  
*Judgment.*

succeed in altering the decree, I must pay out the value of their inheritance, in obedience to its provisions.\*

\* A motion was made on the 20th of April, by Mr. *Brewster*, for a re-hearing; but, under the circumstances of the case, the final decree having been made, and Miss Wallace being a purchaser after the making thereof, and not having been a party to the proceedings in Chancery, the LORD CHANCELLOR refused the motion without costs.

In the matter of the Estate of  
 The Trustees of **TIMOTHY TURNER, Owners and Petitioners.**

*Feb. 25.*  
*March 2.*

S. S., a lessee of certain premises, for 125 years from the 25th of March 1782, by a lease, dated the 21st of July 1787, and which contained the usual clauses of distress and re-entry, demised the same to E. H., for 120 years from the 25th of March then last past. Twenty-two years' arrears of rent accrued due to the representatives of the lessor in the last-mentioned lease.—*Held*, that, although S. S. had no reversion expectant on the determination of the said lease of the 21st of July 1787, yet that the rent reserved by the said lease was a conventional rent, and that, therefore, the right of the representatives of S. S. to the rent during the residue of the term was not barred by the 3 & 4 W. 4, c. 27, s. 2.

THE absolute order for sale in this estate comprised, amongst others, certain premises in Lower Mount-street, in the city of Dublin, held under a lease, dated the 21st of July 1787, and made between Samuel Sproule, of the one part, and Edward Hearn, of the other part, for the term of 120 years from the 25th of March then last past, and, after that date, during the residue of the term, at a yearly rent of £16. 9s. 7d., late currency. The material facts of the case appear in the judgment. The owners insisted that the premises should be sold discharged from the payment of any rent during the residue of the term, on the ground that S. Sproule having made the lease, without retaining a reversion, the rent thereby reserved was not a conventional rent; and, therefore, the case not coming within the principle of *Grant v. Ellis*, the right to recover the rent was barred by the 2nd section of the Statute of Limitations (a), no rent having been paid for twenty years.

Mr. *R. R. Warren*, for John and Phineas Riall.

*Grant v. Ellis* (b) was decided on two distinct grounds, either of

(a) 3 & 4 W. 4, c. 27.

(b) 9 M. & W. 113.

which was sufficient to support the decision : firstly, that from the word "recover," in the statute, the Legislature did not mean to apply it to conventional rents of any kind ; and, secondly, that there was no estate in the rent, but in the reversion, in that case. If the first ground were sufficient to support the decision, it is applicable to this case, which is a conventional rent, although no reversion exists.

He also cited *Daly v. Bloomfield* (a) ; *Jack v. M'Loghlen* (b) ; *Crosbie v. Sugrue* (c) ; *Manning v. Helps* (d) ; *Shannon v. Hodder* (e) ; *Shiel v. Incorporated Society* (f). He also argued on the analogy of tithes, and the decisions thereon, and cited *Dean of Ely v. Bliss* (g).

Mr. *Tuthill*, for an incumbrancer, relied on the case having been decided by *James v. Salter* (h), and that there was no reversion, and, therefore, no relation of landlord and tenant : *Pluck v. Digges* (i) ; and that the estate in this case was in the rent, which was a rent-charge, and, therefore, within the 2nd section of the Act.

Mr. *Ince*, for the owners.

DOBBS, J.

In this case, Samuel Sproule, by a lease, bearing date the 21st of July 1787, demised certain premises in the city of Dublin to Edward Hearn, to hold to him, his executors, administrators and assigns, from the 25th of March then last past, for the term of 120 years, at a pepper-corn rent, to the 29th of September 1789, and, after that date, during the residue of the term, at the yearly rent of £16. 9s. 7d., Irish currency. The lease contained a clause of distress ; and, if no sufficient distress, a proviso, in these words, " that it should be lawful for Samuel Sproule, his executors, administrators

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(a) 5 Ir. Law Rep. 65.

(b) 1 Ir. Com. Law Rep. 186.

(c) 9 Ir. Law Rep. 17.

(d) 10 Ex. Rep. 59.

(e) 2 Ir. Law Rep. 223.

(f) 10 Ir. Eq. Rep. 411.

(g) 2 De G., M. & G. 459.

(h) 3 Bing. N. C. 544.

(i) 5 Bli. 31 ; S. C., 2 D. & C. 180.

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*Judgment.*

and assigns, into the premises to re-enter, and the same to have again, re-possess and enjoy, as in his or their first and former estate, anything herein to the contrary notwithstanding." The lease also contained a covenant by Edward Hearn to pay the rent. The lessee's interest under this lease afterwards became vested in the owners in this matter, and is now to be sold in this Court. Samuel Sproule, at the time he made the lease of 1787, held by a lease of 1782, for 125 years from the 25th of March 1782; so that the effect of the lease of 1787 was to leave no reversion in him. Samuel Sproule's interest came, by mesne assignment, to a Miss Roberts, and, being a chattel, is now vested in her legal personal representatives. It appears from the evidence, and is admitted, that there has been no payment of the rent of £16. 9s. 7d. to Miss Roberts, or her representatives, for twenty-two years; and the parties interested in the lessee's estate claim to hold the premises during the residue of the term, discharged of the rent, on the ground that, it being only a rentcharge, the 2nd section of the statute 3 & 4 W. 4, c. 27, applies to it, and, therefore, is extinguished by the joint operation of the 2nd and 34th sections of that statute. The lessor's representatives have filed a claim, by which they admit that Samuel Sproule, at the time he made the lease of 1787, had no reversion; but, nevertheless, they claim to be entitled to the rent, because, notwithstanding they have no reversion, yet the 2nd section of the statute is inapplicable to such a rent, although admitted to be only a rentcharge. Now, if Samuel Sproule had reserved to himself a reversion of but one day, it is clear that the decision in *Grant v. Ellis* would have been applicable to this case; and the rent, being what is there termed a conventional rent, would not be within the meaning of the word "rent," in the 2nd section. On the other hand, if it were a rentcharge which Samuel Sproule, as possessed of a term of years in land, had charged upon the term in favour of a grantee, with a power of distress, such grantee's estate in the rentcharge would be extinguished, by his allowing twenty years to elapse without a payment, or acknowledgment of his right. *James v. Salter*, and subsequent cases, may be considered as authorities for this position. The doubt in the present case arises from the circumstance that the

deed of 1787 is in terms a demise reserving rent, in the words generally used in, and applicable to, a lease where the relation of landlord and tenant is intended to subsist immediately on the execution of the instrument, and also contains a power of distress and re-entry applicable to that relation; while, from there being no reversion, the relation of landlord and tenant has not arisen, and does not exist. *Pluck v. Digges* declares that, in construing the word "landlord" in the statute 25 G. 2, c. 13 (*Ir.*), it must be held that a person who had no reversion was not a landlord, within the meaning of the Act, as there is not the relation of landlord and tenant without a reversion. But that does not affect the question in this case. Here the question is, whether a rent may not be such a conventional rent as has been held not to be within the meaning of the word "rent," in the 2nd section of the last Statute of Limitations, although the person entitled to the rent has no reversion, and consequently, there is not, strictly and technically, the relation of landlord and tenant; and, whether the rent in this case is such a conventional rent, I am of opinion there may be such a conventional rent without a reversion, and the relation implied therefrom, and that the rent made payable by the deed of 1787 is such a rent. The grantee of a rentcharge may have a clause of re-entry in the instrument creating the rent; but the wording of such a clause is quite different from the clause of re-entry in the deed of 1787; and in leases where the parties intend the relation of landlord and tenant to be created by the instrument. In the former cases, the power of re-entry is confined to entering and holding the lands until the arrears are satisfied; and, if the grantee enter, the only interest he can have in the lands is a chattel interest of indeterminate duration, until the arrears are satisfied. The estate of the grantor he never can acquire; but, in the latter cases, the re-entry of the lessor is, by the terms of the proviso, to restore him to his former estate; and, if he enters, he is in of and for his former estate. Now, the case of *Doe d. Freeman v. Bateman* (a) expressly and clearly decides that, where a termor for years demises lands for

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(a) 2 B. & Ald. 168.

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a term co-extensive with his own, reserving rent, with a proviso for re-entry, he may, on entry for condition broken, recover the possession of his former estate in the term, although he has no reversion. That is this case. J. Sproule, or his assigns, could recover the possession of the lands, as of his former estate, on entering for condition broken. If so, how does the rent in this case differ from the conventional rents to which the statute has been held not to apply? It is a rent, by agreement between the parties, to be paid as a conventional equivalent for the right of occupation of the land; and, if not paid, the party entitled to it can recover the possession of his old estate in the lands. It is true this estate is not a reversion; but it is a possibility of reverter, not separated from the right to recover the rent, and which has exactly the same capability of being turned into the possession of the former estate that a reversion has. Such a rent is, therefore, in my opinion, a conventional rent, as much as if there were a reversion instead of the possibility of reverter, and, as such, is not within the 2nd section of the statute; and I cannot help thinking that Lord St. Leonards had in his mind such a conventional rent without a reversion, when he used the words reported in p. 472 of 2 *De G., M. & G.*, in the case of *The Dean of Ely v. Bliss*. He says:—"I think it clear, from repeated consideration of it, that *rent*, in the sense in which it is spoken of in the 2nd section, means rent of inheritance, and that it does not mean rent reserved by a lease, for example, or rent in the common and ordinary form of a render of rent for property." This is the opinion, on repeated consideration, of the best and most experienced real property lawyer of the age; and it seems to me plainly to refer not only to rent reserved by a lease where there is a reversion, but to rent generally, when made payable as a render of rent for property. The cases as to tithes, referred to by Mr. *Warren*, show that the operation of the statute, even in the case of tithes (which, by force of the 1st section, are included in the meaning attached to the word "land," in the 2nd section), is confined to cases where there are two parties, each claiming an adverse estate in

the tithes; and the construction must be the same as to "rents;" and in the case before the Court there are two parties, each claiming an adverse estate in this rent, *united*, as that estate is, with the power, in the case of a breach of condition for the non-payment of the rents, of recovering possession of the land for the original estate of the lessor therein. For these reasons, I am of opinion that the claim must be allowed; but, as the question is one of considerable doubt, and does not appear to have been expressly decided, and as it has arisen by reason of the *laches* of the person claiming the rent, in lying by for twenty-two years, I allow the claim, without costs.

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## SIM v. SIM.

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16.

April 16.

*(In the Rolls).*

No precise form is necessary to constitute a stated and settled partnership account.

An account drawn up in the handwriting of one partner, A, eight years after the dissolution of the partnership, stating the assets of the firm at the time of the dissolution, and taking the excess of the assets over the original capital, as representing the balance of profit over loss on the several transactions, and stating the amount drawn out by each partner, and the amount coming to each, and in which account A, after giving credit for various payments made to his co-partner, B, after the dissolution, struck a balance against himself, and which account was assented to by B—*Held*, a stated and settled account, though some debts due to the partnership were omitted as uncertain.

A party seeking to impeach or surcharge and falsify a stated and settled account must state the fraud or error on which he relies, in the petition.

If a partnership be admitted, the books are admissible in evidence, in taking the account of the partnership transactions; but the books of A are not admissible against B to prove a partnership, if it be denied.

In November 1843, the petitioner, Alexander Sim, sen., and the respondent, Alexander Sim, jun., entered into partnership, as corn-merchants. The terms of the partnership were, that the petitioner was to be entitled to one-sixth, and the respondent to five-sixths of the profits. The business of the firm was carried on at Glasgow, in Scotland, and at a place called Colooney-mills, in the county of Sligo, in Ireland, until September 1848, when a new arrangement was entered into, by which the petitioner was to be entitled to one-third of the profits. The petitioner alleged that the new arrangement was entered into by way of concession to him, in order to induce him not to press for a dissolution of the partnership, and payment of his share of the profits. The respondent alleged that the arrangement was entered into as a favour to the petitioner, who was about to be married. The partnership was carried on on the new terms from the 18th of September 1848 until the 18th of September 1849, when the petitioner entered into a partnership with Andrew Hozie. On the occasion of the dissolution of the partnership, an account was drawn up, and signed by the partners on the 17th of September 1849. On the same day, the following letters were written by the respondent:—

“Colooney, 17th of September 1849.

“GENTLEMEN—I accept of your offer for the lease of Dromahair mills, &c., on the terms mentioned on the other side; and, with reference to my letter to your Mr. Alexander Sim, jun., of this

date, regarding his interest in the business carried on in my name here and at Glasgow, since 4th of November 1843, *I hereby agree, in consideration of his said interest not being settled up at present, to advance, by cash or by my acceptance, or otherwise, an amount not under £2000, as the same may be required by you, to enable you to carry on the business at the said mill.*

"I am yours, respectfully—ALEX. SIM."

"Say £2000.

"Messrs. Alex. Sim, jun., and Andrew Hozie."

"Colooney, 17th of September 1849.

"SIR—I have *this day placed to the credit of your account in my books the sum of £1000 sterling*, being to account of your interest of one-sixth in the business carried on in my name here and in Glasgow, from 4th of November 1843 to 18th of September 1848; and your interest at one-third in the same firm, from 18th of September 1848 to this date. *I engage to have all the books connected with the business brought up and balanced with the least possible delay; and when the remaining sum due you is ascertained, it will be placed to the credit of your account. It is understood that you give every assistance in your power in having the accounts here and elsewhere brought to a close, and that you have no further interest in said business from this time henceforth.*

"I am, Sir, your obedient servant—ALEXANDER SIM."

"To Mr. Alex. Sim, jun."

On the 1st of September 1857, a further account was drawn up by the petitioner, in his own handwriting, by which a balance was found to be due by the petitioner, of £35. 5s. 9d. The accounts set out the assets of the firm, consisting of stock on hands, debts, &c., existing at the date of the accounts respectively, and contained a debtor and creditor account; and a balance was struck. The accounts were very long; but, for the purpose of this report, the result of them is sufficiently explained in the judgment of the Master (*infra*, p. 312, *note*), and in the judgment of the MASTER OF THE ROLLS.

The petition was filed in the month of March 1860. It prayed for an account of the partnership which was carried on from 1843 and 1849; and also of another partnership entered into

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between the petitioner and the respondent in 1859. It did not in any way refer to the accounts of 1849 and 1859, or make a case to surcharge and falsify any item therein.

The matter having been referred to Master Litton, under the 15th section of the Chancery Regulation Act, the petitioner, by his discharge, relied on the accounts of 1849 and 1857, as stated and settled accounts. As to the transaction of 1859, the defence made by the discharge was, that there was no partnership, and that the petitioner merely acted as the respondent's agent; and in support of it produced a letter written by the petitioner, on the 3rd day of August. The only evidence of the partnership produced by the petitioner was the books containing the transactions in respect of which the partnership was alleged to exist.

The Master, by his decretal order, dated the 20th of December 1860, declared that the petitioner was entitled to an account of the partnership from its commencement, on the 4th of November 1843 until its dissolution, on the 18th of September 1849; and that he was also entitled to an account of the dealings and transactions in relation to the limited partnership in 1859.\*

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\* The Master delivered the following judgment:—"The authorities which have been relied on by the respondent (and all the leading authorities upon the subject have been cited) quite establish the propositions upon which his Counsel have relied:—

"Firstly; viz., that, if an account be otherwise settled, the reservations of an item or items for further arrangement or discussion will not take from it its character of finality, or prevent it from being considered as a settled account.

"Secondly; that an account, once admitted, cannot be opened, on the ground that no party had adequate means of ascertaining whether it was erroneous or not, without charging specific acts of fraud.

"Thirdly; that, when persons have mutual dealings, signing the account is not necessary to make it a stated one; but keeping it any length of time, without making an objection, will suffice.

"Fourthly; that, if a merchant keeps an account by him for two years, without objection, it is considered as a 'stated account.'

"The question then is, whether the accounts which have been settled, or which are relied on as settled accounts by the respondent, being the exhibits Nos. 1 and 2, come within these principles, and whether they are governed by them? I am of opinion that they do not come within these principles, and are not governed by them. In my opinion they do not present a partnership account at all; nor do they affect to present a partnership account.

"A partnership account, purporting to be a final settlement between the partners, to be complete, must contain, firstly, the capital account; secondly, the profit and loss account; thirdly, the balance account; fourthly, a separate account

From that order the respondent appealed. The statements in the petition and discharge are fully stated in the judgment of the MASTER OF THE ROLLS.

Mr. *F. W. Walsh* and Mr. *Richey*, for the petitioner.

Mr. *Brewster*, Mr. *Hemphill* and Mr. *Dowse*, for the respondent.

For the petitioner it was contended, in support of the Master's order, that neither of the accounts of 1849 or 1857 was a stated and settled account, and that it was not necessary, therefore, either to notice them in the petition, or to state any ground for surcharging

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for each of the partners, showing what cash and goods each has drawn out of the concern during the period of the account. No. 1 should show the capital in hands at starting; No. 2 (showing the net profits) should be added to No. 1. No. 3 (showing the net amount of property, over liabilities, at date of closing) should be precisely equal to the amount of Nos. 1 and 2. But the exhibits Nos. 1 and 2 profess to be merely an abstract of the balances found in the books at the date of closing the partnership; therefore, even if correct, forming only one ingredient in the items of which a partnership account must of necessity be composed. No such account can possibly be correct, unless thoroughly tested by the combination of the above-named *three* accounts. But, on referring to the books, I find that, if the books are correct, these exhibits are manifestly and palpably incorrect, differing widely from the books, omitting many balances, and incorrectly quoting others. Besides, the ledger is quite in an unsettled state, showing several large properties unaccounted for, which, if properly brought to a close, would greatly affect the relative interests of the partners.

"Those accounts amount to a very large sum; and the unclosed accounts are very numerous. It is impossible that justice can be done until a true account of the profits and losses be made out. The following items of profit, for instance, appear to me not to have been accounted for:—

The Indian corn account ... ..	£11,555	5	8
Commission account ... ..	3652	1	10
Consignment per "Maria" ... ..	1608	6	3
Sligo shop ... ..	1107	11	5
Several consignments, upwards of ... ..	8000	0	0
Indian meal ... ..	3689	0	0

"In a correct partnership account, these profits must be accounted for by the party through whose hands they come. The exhibits Nos. 1 and 2 are also altogether deficient, in not containing a separate personal account, showing what each party has drawn out of the concern during the partnership. These exhibits purport simply to show the excess of the assets over the liabilities, and would seem intended to convey that each party was now entitled to his portion of that excess; but in fact same should only go to his credit, against whatsoever sums he had previously drawn thereout; and it might turn out that he had drawn in excess of his share of the profits.

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and falsifying them, as the rule which required that to be done applied only to stated and settled accounts: *Irving v. Young* (a); and they relied on the partnership books as clearly showing that a partnership existed in 1859. The respondent's Counsel relied on the accounts as stated and settled accounts, and relied on the rule established by *Dawson v. Dawson* (b); *Johnson v. Curtis* (c); *Pitt v. Cholmondely* (d); *Gray v. Minnethorpe* (e); *Lord Hardwicks v. Vernon* (f); *Drew v. Power* (g); *Stupart v. Arrowsmith* (h); *Tichel*

(a) 1 Sim. &amp; St. 333.

(b) 1 Atk. 1.

(c) 3 Br. C. C. 266.

(d) 2 Ves. 565.

(e) 3 Ves. 107.

(f) 4 Ves. 411.

(g) 1 Sch. &amp; Lef. 182.

(h) 3 Sm. &amp; G. 176.

"Having reference to all these facts, it is evident that exhibits Nos. 1 and 2 cannot possibly show the true position of either party, as regards their respective interests in the estates; and that, if the accounts were properly closed, and the books balanced, the result would almost certainly be widely different from that shown in exhibits Nos. 1 and 2; and, therefore, no partnership accounts whatsoever, and nothing like a partnership account, has been taken or rendered. It follows that these exhibits prevent no bar to the taking of a regular partnership account, and that it was not necessary to point out, either in the petition or in the charge, errors, omissions or mistakes, because the exhibits themselves do not even profess to present the account to which one partner is entitled as against another; and, so as settled accounts of a partnership concern, they amount to nothing; nor, as they are framed, could they be the subject of corrections, by reason of errors or omissions; for they do not deal with a partnership account at all; nor yet does the account of exhibit No. 3. These views refer to the partnership existing from 1st of September 1843 to the 17th of September 1849; as to which the usual partnership account must, in my opinion, be taken.

"As to the transaction of the year 1859, the subject of which was the cargo by the 'Egeria,' I am of opinion that petitioner was not a mere agent. I think the letters which passed between the parties in relation to same do, with the other facts and circumstances of the case, go to establish a partnership in 1859. That a large quantity of white wheat must have been obtained, for the purpose of mixing with the red wheat, which was supplied by the respondent, seems certain; that such white wheat was supplied by the petitioner, who was to superintend the grinding, seems clear. It is alleged that the respondent supplied all the money necessary for the purchase of the white wheat; but such fact is not made out.

"Therefore, upon the entire of the transactions and correspondence, I have arrived at the opinion that there was a partnership in relation to the red and white wheat concern, and that an account must be taken accordingly. Indeed, if it were otherwise, still, as some account must be taken to wind up the transaction of 1859, I do not see that any account more adequate for that purpose than a partnership account could be taken. As to the Statute of Limitations, I do not think that either it, or the time which has elapsed, presents a bar to the right to these accounts. Frame a decretal order pursuant to these rulings."

v. *Short* (a); *Darthez v. Lee* (b); *Sumner v. Thorpe* (c); that it is necessary, in order to impeach, to state in the bill matter to surcharge and falsify them.

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April 18.  
*Judgment.*

**THE MASTER OF THE ROLLS.**

A motion has been made in this cause, on the part of the respondent, that the decretal order of E. Litton, Esq., the Master in this matter, signed the 20th of December 1860, be set aside, and that the petition be dismissed with costs; or, in case the Court should be of opinion that the petitioner is entitled to any relief in respect of the partnership which was dissolved in 1849, that the two accounts in the notice mentioned, dated in 1849 and 1857, should be deemed conclusive between the petitioner and respondent; and that the accounts in respect of the said partnership should be limited as in the notice of motion mentioned; and with respect to the limited partnership alleged by the petitioner to have been entered into between the petitioner and the respondent in 1859, the notice of motion seeks that the Court should declare that no such partnership existed.

By the decretal order of the Master it is ordered, first, that the petitioner is entitled to an account of the dealings and transactions in relation to the partnership between the said petitioner and the respondent, which was entered into upon the 4th of November 1843, and was dissolved on the 17th of September 1849; and secondly, that the petitioner is entitled to an account of the dealings and transactions between the petitioner and respondent, relative to the limited partnership entered into between the petitioner and the respondent in the year 1859, in the cause petition mentioned; and consequential directions are then given by the order.

The two branches of the case are quite distinct, and involve different considerations. The defence to the first branch of the case, which I shall state more fully just now, is that, after the partnership between the petitioner and respondent was dissolved,

(a) 2 Ves. 239.

(b) 2 Y. & Col., Ex., 5.

(c) 2 Atk. 1.

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*Judgment.*

in 1849, an account was drawn up in that year by the petitioner (all of which is in his own handwriting), ascertaining the balance due to the petitioner in respect of the said partnership; and a further account was drawn up by the petitioner, in his own handwriting, in the year 1857, correcting some errors in the first account, and striking a balance; and the respondent contends that such accounts are to be considered as stated and settled accounts, or that the latter account is, at all events, to be considered a stated and settled account. The petitioner has wilfully suppressed from the petition all allusion to the said accounts, and has not put in issue any matters to show that they should either be set aside, or liberty given to surcharge and falsify them. The Master has, by his order, in effect set aside the two accounts, and directed a general account, after the lapse of many years. I am of opinion that the Master's order is erroneous in having directed a general account in respect of the partnership which was dissolved in 1849, the accounts of 1849 and 1857 not having been put in issue by the petition, or any ground stated in the petition why those accounts should be set aside.

As to the second question which arises, the Master has decided that there was a limited partnership, in the year 1859, between the petitioner and the respondent. But his decision is founded in part on the petitioner's own books, which were clearly not evidence against the respondent on the question whether there was or was not a partnership in that year, the respondent alleging that, in respect of the transactions in that year, the petitioner acted only as his agent.

The petition states the formation of the partnership between the petitioner and respondent in November 1843; the petitioner being entitled to one-sixth, and the respondent to five-sixths of the profits. The latter part of the fourth paragraph of the petition states what I consider to have been a very improper allegation, having regard to the facts of the case, that "No statement or settlement of the accounts of the partnership was come to between the petitioner and Alexander Sim" (the respondent).

The petition then states the mode in which the business was

carried on, the respondent residing at Glasgow, and the petitioner at the Mills of Colooney, in the county of Sligo. The petitioner states that the respondent retained in his possession all the books, &c., and that the petitioner was unable to obtain accurate information as to the partnership accounts. That statement is not, in my opinion, sustained by the evidence. The petition then states that, in the years 1846 and 1847, the respondent embarked in large speculations in grain, on his own account, during which he incurred heavy losses; and, to meet his liabilities on this account, he applied large sums of money connected with and arising from the partnership business. If there is any truth in this statement, which is wholly denied by the respondent, all the partnership books were lodged in the Master's office since, I believe, the month of June last, and the petition might have been amended, and the items put in issue. At the hearing of this appeal, Counsel did not refer to any item in the books in support of the statements, except as I shall hereinafter state. The petition then states that, in consequence of these losses, the petitioner insisted that the partnership should be dissolved, but the respondent requested that the connection should not be broken off; and he proposed that the petitioner's share in the co-partnership should be increased to one-third; and the petitioner refers to a letter of his, of the 15th of August 1848, and the respondent's reply thereto.

The petition then states that the partnership was carried on, on the new terms, from the 18th of September 1848 to the 18th of September 1849, when it was dissolved; and that the petitioner then entered into partnership with a Mr. Hozie. The petition suppresses altogether the fact that an account was then drawn up by the petitioner himself, in his own handwriting; and the petition states (paragraph eleven), that the petitioner insisted on a settlement of his accounts with the respondent, and the payment of the sum of money which might be found due to him upon such settlement. But the said respondent, as the petition states, on that occasion also avoided coming to any settlement, assuring the petitioner that, after the large losses which he had sustained, he could not then pay the amount which might be found due. But the

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petition states that the respondent promised to advance to the petitioner a sum in cash, or by his acceptance or otherwise, of not less than £2000, on account of the sum which on the ultimate settlement of the accounts should appear to be due; and that the respondent promised to wind up the partnership accounts with all possible speed; and the petitioner refers to two letters of the 17th of September 1849, the one to the petitioner and the other to the petitioner and the said A. Hozie, but suppresses the account drawn up by himself in September 1849. I think, however, that those letters establish that the account of 1849 was not a stated and settled account. The petition then proceeds, to paragraph 19 inclusive, to refer to certain matters connected with the acceptances and sums paid on account in respect of the balance claimed by petitioner on foot of the partnership; but suppresses all allusion to the account drawn up by himself in 1857, striking a balance. The rest of the petition relates principally to the alleged limited partnership in 1859, which part of the case I shall hereafter advert to.

It appears, from the discharge of the respondent, that the statement in the petition that the respondent retained in his possession all the partnership books, &c., is not correct; for some of the partnership books were kept at Colooney by the petitioner, or by clerks employed by him; and other books of account of the partnership were kept at Glasgow by one John Thom, a book-keeper in the employment of the firm; and the discharge states that, previous to the dissolution of the partnership in September 1849, all the partnership books and accounts, which had been previously kept at Glasgow, were brought over to Colooney by the said J. Thom and by the respondent; and the petitioner and Thom, to the respondent's knowledge (he having been himself at Colooney), carefully examined all the books and accounts of the partnership so kept at Glasgow, and also those kept at Colooney by himself; and the respondent saw the petitioner and the said Thom going over the said books together at Colooney, in which they were occupied for about a week. The respondent then states that he inquired from Thom whether he and the petitioner had been particular in examining the accounts? and he said they had. Thom, however, is dead; and it is very

unjust on the part of the petitioner to lie by for so many years, and, as soon as the clerk is dead, whose evidence would have been so important, to bring forward the present suit, and make the very improper statement in the seventh paragraph of the petition, that the respondent "retained in his possession all the books of account, papers and documents connected therewith (*i. e.*, connected with the partnership); so that the petitioner remained ignorant, and was unable to obtain accurate information as to the partnership accounts." The discharge then states that the petitioner, by means of such examination, obtained full and accurate information as to the state of the partnership accounts, both at Glasgow and Colooney; and the petitioner, after the said examination of the said books, and in the year 1849, made out from the said partnership books, in his own handwriting, a detailed statement of the accounts of the said partnership, which contains two columns, headed respectively Colooney and Glasgow, in which columns are entered, opposite each of the items in said statement, a number referring to the books kept at Glasgow and Colooney respectively, in which the particulars of each of the said items appear; and the discharge refers to said account in the petitioner's handwriting.

The discharge then states that the stock on hands of the said partnership is valued in the said account at £10,056. 12s. 9d.; and the respondent refers to a paper in the handwriting of Thom, dated the 19th of September 1849, and at foot thereof is a memorandum signed by both the petitioner and the respondent, as follows, "The above is taken as correct." The seventh paragraph of the discharge then denies the statement in the eighth paragraph of the petition, that the respondent had, in the years 1846 and 1847, embarked in speculations in grain upon his private account, or that he had incurred losses, or applied large, or any, sums of money arising from the partnership business, to meet the liabilities of the respondent. No evidence has been read to me in support of this statement in the petition. One entry was read, which is not put in issue, that a part of the funds of the partnership were applied in payment of a cargo of guano, purchased on the private account of the respondent. But Counsel for the respondent stated that if

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*Judgment.*

any such matter had been put in issue, it could have been proved that the sum so applied was replaced.

The discharge then states that the increase of the petitioner's share of the profits from one-sixth to one-third was made because the petitioner was about to be married, and for no other cause whatever.

The discharge then relies on the account drawn up by the petitioner in 1849, and states that the petitioner being about to commence business at Dromahair Mills, the property of the respondent, in partnership with A. Hozie, the respondent agreed to credit, and did credit, the petitioner and A. Hozie with £1000, in respondent's books; and did also agree to advance by cash and acceptance a sum of £2000, in order to give the petitioner a capital with which to commence the business of the firm of Sim and Hozie.

The discharge then explains a transaction adverted to in the petition, relating to an acceptance for £1000, which the respondent eventually took up, not to embarrass the petitioner and Hozie.

The discharge then refers to some matters which, from the view I take of the case, are not material to advert to; and refers to the particulars of the account of 1849, drawn up by the petitioner. The discharge then states that the petitioner having received large payments from the respondent, on account of his share of the profits of the partnership which was dissolved in 1849, and retained the rent payable to the respondent for the Mills of Dromahair for several years, the petitioner, about the 1st September 1857, made out a second account in his own handwriting, of the business of the partnership: and the short result of that account is this; that the petitioner having credited himself with the one-sixth of the profits on four seasons, from 1844 to September 1848, and with one-third of the profits from September 1848 to 1st of September 1849, when the partnership was dissolved, which profits amounted to a less sum than was stated in the account of 1849, and having also credited himself with some other small sums, and having debited himself with various sums, received

from the respondent to the 1st of September 1857, a balance is struck, in the petitioner's handwriting, by which it appears that, on the 1st of September 1857, he was over-paid the entire of the sum due to him on foot of the said partnership, by a sum of £35. 11s. 9d.

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*Judgment.*

What justification there was, or is, for the petitioner suppressing all reference to that account of 1857, in the petition, is not suggested by the petitioner's Counsel; nor do I understand on what grounds the Master had authority to set aside the account of 1857, drawn up by the petitioner himself, the account not having been put in issue, either by the petition, or by an amended petition, or any matter put in issue to show that it ought to be set aside, or liberty given to surcharge or falsify it. The Master has decided the case upon grounds not stated in the petition; and the inconvenience of such a course is this, that, on my calling on Counsel to refer to the partnership books, and satisfy me that the accounts of 1857, as drawn up, were erroneous, a notice was served, dated the 12th of February, referring to about 127 numbers in the Colooney ledger, to upwards of 100 numbers in the Glasgow ledger, and to upwards of 50 numbers in other ledgers, making together upwards of 270 numbers; but Counsel for the petitioner were so entirely uninstructed on the case, that they were unable to explain any one of those numbers, or show how they falsified the account of 1857. The discharge then explains the account of 1857.

The ground on which the Master has in effect set aside the account of 1857 is this, that the accounts of 1849 and 1857, as he alleges, do not present partnership accounts at all. So far as the account of 1849 is concerned, the contemporaneous letters, I think, show that it was not a stated and settled account; and it was, no doubt, subject to be set right, as it was by the account of 1857; but the Master considered the latter account as no partnership account, because, as stated in his judgment, "A partnership account, purporting to be a final settlement between the parties, to be complete, must contain, first, the capital account; secondly, the profit and loss account; thirdly, the balance account; fourthly, a separate account for each of the partners, showing what cash and goods each has

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drawn out of the concern during the period of the account. No. 1 should show the capital in hands at starting. No. 2 (showing the net profits) should be added to No. 1. No. 3 (showing the net amount of property over liabilities at date of closing) should be precisely equal to the amount of Nos. 1 and 2. But the exhibits Nos. 1 and 2" (that is, the accounts drawn up in the petitioner's handwriting in 1849 and 1857, and which, I believe, are numbered 1 and 5) "profess to be merely an abstract of the balance found on the books at the date of closing the partnership; therefore, even if correct, forming only one ingredient in the items of which a partnership account must, of necessity, be composed." The Master, in his judgment, then states that, if the books are correct, the exhibits are palpably incorrect—that the ledger is in an unsettled state, showing large properties unaccounted for. The Master then states that it is impossible that justice can be done, unless a true account of the profits and losses be made out. The Master then states "That the following items of profit, for instance, appear not to be accounted for;" and the Master then states certain items, and then refers to other objections. Now, the injustice of this course of proceeding (which, in my opinion, is contrary to several decisions from the time of Lord Hardwicke, to which I will just now refer) is this, that if the accounts of 1849 and 1857 had been put in issue by the petition, instead of being wilfully suppressed, and if the objections stated for the first time in the Master's judgment had been relied upon in the petition, as grounds either for setting aside the account of 1857, or surcharging and falsifying it, the respondent would have had the opportunity of answering the several objections. I understand from Counsel, that the Master has consulted an accountant, and acted on his opinion. The effect of the Master's judgment appears to be this, that there was no stated and settled account. He considers (adopting the opinion of the accountant) that, unless an account between partners be drawn up in the precise form he suggests, that it is no account. I cannot concur in that proposition, which was never, up to the present time, decided in any case. According to the Master's opinion, if two partners, having a general knowledge of their affairs, dissolve partner-

ship, and their books have not been kept with strict regularity, showing the profit or loss on each particular transaction, and showing, in a general profit and loss account, the balance of profit over loss, if there be a profit, that the partners must employ an accountant, must have the accounts all made out, on the precise principle stated by the Master, and can come to no amicable arrangement without the intervention of an accountant. Suppose two parties were to draw up an account, stating the original capital, then stating the realised or existing assets at the time of the dissolution, and taking the excess of the assets over the original capital as representing the balance of profit over loss on the several transactions, and then ascertaining the sums or property drawn out of the partnership by each of the partners, and the amount coming to each partner; such account, according to the decision of the Master, is no stated or settled account, although drawn up in the handwriting of one of the partners, and admitted by the other to be correct. I believe that was the course adopted in this case, except that some debts due to the partnership were left out of the account, as it was not certain whether they would be paid; but the respondent has always been ready to account for debts received, and not included in the sum which, on the account of 1857, was payable to the petitioner. According to the Master's decision, although the partner who draws up the account, in his own handwriting, ascertaining the balance due to him, is paid such balance by his co-partner, he is, at the end of ten or eleven years, to be at liberty to file a petition for a general account, suppressing all reference to the account, and not specifying a single item of surcharge or falsification. Partners who annually pay Income-tax must be assumed to have some knowledge of the state of their accounts; but the accountant, whom the Master has unfortunately consulted, considers, I presume, that there can be no amicable settlement between two partners, at the close of their partnership, without the expensive process of employing an accountant.

Unless the Master be right, that the account of 1857 was not a stated and settled account at all, it is, of course, impossible that the decretal order can stand; because, if it was a stated and settled

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account, but is to be set aside (although drawn up by the petitioner himself), for gross errors, or if liberty should be given to surcharge and falsify the account, on account of errors, the errors are not, for the first time, to be stated in the judgment of the Court. They, or some of them, should be put in issue, so as to enable the respondent to show, by his answer, that there is no error. An affidavit in reply to the discharge has been filed, by which the petitioner seeks to get rid of the effect of his having drawn up the accounts of 1849 and 1857; and he states, amongst other matters, that inasmuch as the accounts "were never intended to be anything but as a means of ascertaining what amount, at the time, I had a right to expect from the respondent, for the purpose of entering into a new partnership, the objections were never, in fact, discussed between me and the respondent, or made the subject of any accounts." This may be true as to the account of 1849, but is wholly untrue as to the account of 1857; and the letters referred to by the petitioner do not, in my opinion, establish or verify the allegation of the petitioner; but the letters and facts relied on by the petitioner ought to have been put in issue by the petition, and not by an affidavit in reply, as has been decided by the Court of Appeal. Many matters are stated in the voluminous affidavits in reply, which do not appear to me to be relevant to the question which I have to decide; and that is, whether the account of 1857 is to be treated as a nullity or set aside, or liberty given to surcharge and falsify it, where the petitioner has thought fit to suppress all allusion to it in the petition.

In the case of *Dawson v. Dawson* (a), it was decided by Lord Hardwicke, "That where a petition is brought for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill, for the stated account is *prima facie* a bar, till particular errors are assigned, to the stated account." The same point was decided in *Johnson v. Curtis* (b); Lord Thurlow said, "The expression 'errors excepted' did not prevent its being a settled account; and the balance being carried over showed it was so, and, therefore, the errors should have been pointed out." Those observations are very applicable to the account of 1857.

(a) 1 Ask. 1.

(b) 3 B. C. C. 266.

The decree at the Rolls, dismissing the petition, was accordingly affirmed. The same point was decided in *Taylor v. Haylin* (a). Several of the cases are referred to in the note to Mr. *Eden's* edition.

The distinction between cases of guardian and ward, and other persons standing in a fiduciary relation, and cases where no fiduciary relations exist, is adverted to in *Pitt v. Cholmondley* (b), and in the important judgment of Vice-Chancellor Wood, in *Blagrove v. Roush* (c). In the case of *Drew v. Power* (d), Lord Redesdale stated :—" One rule material to observe, in all cases of account, is, that where there has been a settlement of account, and either the account has been signed, or a security taken on the footing of the account, a Court of Equity does not open this transaction and throw it again between the parties, as if no such transaction had happened, unless the evidence which is produced (and that evidence founded on *charges* in the bill) shows the whole transaction to be so iniquitous that it ought not to be brought forward at all to affect the party sought to be bound. If the account impeached be a settled account, or if an instrument has been executed on the foot of it, the Court expects that the errors should be specified in the bill, and proved as specified ; otherwise it would be easy to overturn the fairest accounts, and those settled in the most solemn manner, where there happens to be any complication in their nature."

Lord Eldon, in the case of *Chambers v. Goldwin* (e), states :—" The law, as well as the act of the parties, provides that accounts settled shall not be set aside but for fraud, or surcharged and falsified but for error." . . . . . " The bill must either seek to set aside those accounts, as imputing the settlement of them to fraud, or, letting them stand, must seek to surcharge and falsify them ; in which case, if they are to be considered settled and signed, the rule is fixed, upon the most obvious principle, that some error must be charged ; as it is impossible for the defendant to defend himself, if, under a general charge, not specifying any error, the plaintiff may come, at the hearing, with proof of those errors of which the defend-

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(a) 2 B. C. C. 310.

(b) 2 Ves. sen. 566.

(c) 2 Kay & Johns. 509.

(d) 1 Sch. & Lef. 192.

(e) 9 Ves. 265.

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ant has heard nothing. The point was decided upon the ground, by Lord Thurlow, on my objection, that if accounts are impeached, on the ground of error, you must specify some or one error, and prove that; and that is a ground to surcharge and falsify. I do not recollect a case in which the Court has gone the length of declaring anything error, unless the declaration has been confined to the subject of that which is alleged to be error upon the pleadings. That would be attended with great inconvenience; for it is very possible there might be cases in which the opinion of the Court might be clear at the hearing, that there was error; and yet, if it was distinctly put in issue, the Court might be satisfied that transactions had taken place, upon which it was impossible to consider it error."

These observations of Lord Eldon are very applicable to the present case, in which the Master has relied on matters in his judgment, not put in issue, and which, if put in issue, might have been answered; and when I called on Counsel to read for me the proof of what was stated in the Master's judgment, they were unable to do so. The case of *Chambers v. Goldwin* was referred to and approved by Vice-Chancellor Wood, in *Blagrove v. Routh (a)*. There is much doubt whether the account of 1849 is to be considered as a stated and settled account, having regard to the contemporaneous letters. I think it cannot be so considered; but I am of opinion that the account of 1857 is to be considered *prima facie* as a stated and settled account; and that the petitioner having suppressed all reference to said account in the petition, and having put no matters in issue to show that it should be set aside, or why liberty should be given to surcharge and falsify the account, the general account directed by the Master, as to dealings and transactions in relation to the partnership between the petitioner and the respondent, which was entered into upon the 4th of November 1843, and was dissolved on the 17th of September 1849, should be set aside.

The notice of motion in this case was served on the 14th of January 1861. It appears, from a notice served on the respondent, on the 4th of January 1861, by the solicitor for F. V. Meynell, Esq.,

(a) 2 Kay & J. 523, 529.

that the petitioner, by indenture, dated the 26th of December 1860, assigned, by way of mortgage, to the said Frederick Villiers Meynell, Esq., in the county of Middlesex, Barrister-at-law, all sums of money due to him by the respondent, and all benefit of this suit, and of the order of the Master, to secure the sum of £1544. 4s. 5d. The suit is, therefore, defective, for want of parties, as well as defective in the particulars I have mentioned; and the petitioner was not justified in serving notice of appeal, suppressing that fact, as he has suppressed the other important parts of this case. I shall, therefore, set aside the order of the Master, so far as it directs a general account of the said partnership dissolved in 1849. I do not order the petition to be dismissed, because the petitioner may possibly be entitled to the account stated in the notice of appeal.

As to the second branch of this case; the question is, whether or not there was a limited partnership between the petitioner and respondent in 1859? The Master has, by the decretal order, declared that the petitioner is entitled to an account of the dealings and transactions between the petitioner and the respondent, relative to the limited partnership entered into between the petitioner and the respondent in the year 1859. The respondent wholly denies the existence of any such partnership, in the fifty-sixth paragraph of the discharge. In a letter of the petitioner to the respondent, of the 3rd of August 1859, he states, "I would act *merely as agent for you* in the matter, that you might not have any trouble in the matter." It is not necessary to go through the evidence on this part of the case, as it appears to me that the petitioner has failed to prove satisfactorily a case of partnership in 1859, unless the books of account of the petitioner be evidence. I have not heard any ground suggested, on the part of the petitioner, why they should have been admitted. If you once establish that there is a partnership, partnership books are admissible in evidence; but where one party denies that there was any partnership, I am at a loss to understand on what principle the other party is to produce the books to prove the partnership. Any person acting as agent for the wealthiest merchant in the United Kingdom might, if such evidence

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was admissible, make himself a partner. There are suspicious circumstances connected with these books, adverted to by Mr. *Brewster*. I shall, therefore, declare that the said evidence was inadmissible; and I shall set aside the Master's order, so far as it directs an account in respect of the alleged limited partnership of 1859.

On the 25th of April 1860, the respondent made an affidavit, under the Irish Bankrupt and Insolvent Act 1857, that the petitioner was indebted to him in the sum of £2020; and the effect of directing the taking of general accounts in the Master's office, which might not be disposed of for years, would be to have the proceedings on foot of that affidavit suspended, as the Bankrupt Court probably would not, pending the taking of a general account, allow proceedings to be taken on the said affidavit. No application was made at the hearing to amend the petition; such application was not made, I presume, in consequence of the decision in *M'Namara v. Blake (a)*, and the cases referred to in the judgment in that case. I shall make the following order:—

Order.

It is ordered, by the Right Honorable the MASTER OF THE ROLLS, that the order of Edward Litton, Esq., the Master in this matter, bearing date the 14th of November, and signed the 20th of December 1860, be set aside, so far as it directs that the petitioner is entitled to an account of the dealings and transactions in relation to the partnership between the said petitioner and the respondent, which was entered into on the 4th of November 1843, and was dissolved on the 17th of September 1849; the Court being of opinion that such general account should not have been directed, having regard to the account of the 1st of September 1857, drawn up in the petitioner's handwriting, and which account is not put in issue by the petition, nor any ground stated in the petition for setting aside the same, or surcharging or falsifying it; and it is further ordered that the said order be set aside, so far as it directs an account of the dealings and transactions between the petitioner and

(a) 11 Ir. Eq. Rep. 527.

respondent, relative to the limited partnership stated in the said order to have been entered into between the petitioner and respondent in the year 1859; the Court being of opinion that the books of account admitted in evidence by the Master, as evidence of such partnership, were not properly admissible for such purpose, and that the other evidence on the part of the petitioner does not establish such partnership, having regard to the discharge, and the evidence given on the part of the respondent; and it is, accordingly, ordered that the petition, so far as it relates to the said alleged limited partnership, be dismissed with costs, to be paid by the petitioner to the respondent, when taxed and ascertained; and it is further ordered that the directions in the said order, consequential on the directing of the said accounts, be also set aside; and it is further ordered that the petitioner and respondent do respectively abide their own costs of this motion, and order thereon; and it is further ordered that the deposit lodged with the Registrar be returned to the respondent.

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*Order.*

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**Landed Estates Court.**

In the Matter of the Estate of  
**PETER SARSFIELD COMYN, *Owner and Petitioner.***

*April 18.*

The power given to the Landed Estates Court, under the 72nd section of 21 & 22 Vic., c. 72, is discretionary, and exists both in the case of an incumbered and unincumbered estate. The consent of the landlord is not necessary; but the Court requires that it should be clearly shown that his interest is not in any appreciable degree made less secure, less enjoyable, or less marketable than before. If, however, there is any reason to believe that the petition has not been presented for a *bona fide* sale, but for the purpose of obtaining an apportionment, the Court will make such an order as will apportion the rent, only in case the proceedings be duly prosecuted, and the sale duly had.

THIS was a motion to make absolute the conditional order for the apportionment of the rent reserved by the lease under which the lands for sale (with others) were held, as between landlord and tenant. The owner's estate was free from incumbrances. As the facts are very fully stated in the judgment, it need only be mentioned that Laurence Comyn, the father of the owner, by his will, dated the 23rd day of November 1815, directed that a sum of £11,000 Government stock should be set apart, out of his personal property, for the purpose of providing an annual sum of £385, to be allotted for the payment of the head-rent of £380, payable out of all the lands comprised in the said lease, the extra £5 a-year to be applied in payment of any expense that might attend the payment of the said rent; and the said testator desired that, as soon as the fee and inheritance of the said lands could be purchased, whatever part of the said sum of £11,000 might be necessary to effect such purchase might be applied thereto for the benefit of the testator's sons John and Peter; and the said testator gave and devised the lands of Sellernamore to his second son John Comyn, and his heirs; and to his son Peter, and his heirs (the owner and petitioner), the lands of Spiddle, being the lands the subject of the petition in the said matter. John Comyn, having entered into possession of the lands so devised to him, died in 1834, unmarried and intestate. On his death, differences having arisen between the surviving members of his family as to the division of his property, by a deed of compromise, made in the year 1839, it was agreed that the sum of £10,153. 16s. 11d., equal to £11,000 late currency, should be transferred

to the trustees therein mentioned, upon the trusts of the will of Laurence Comyn; and by the said deed the said lands of Sellernamore were conveyed to Francis Comyn (brother of the owner), charged with the payment of certain annuities. The reversion expectant on the determination of the said lease was vested in Andrew Martyn.

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*Statement.*

The said Andrew Martyn filed an affidavit as cause against the said order, in which he swore (amongst other things), that the lands of Spiddle were about ten miles from the town of Galway, and were a great additional security for the rent. That the lands of Sellernamore, which were fifteen miles from the said town, consisted principally of wild mountain land, and that both the said lands of Spiddle and Sellernamore were in a very wild and uncultivated party of the county. That all the lands were occupied by a poor tenantry in small holdings, and that, during the famine years, a very small portion of rent was paid by the tenants of the lands of Sellernamore. The said Francis Comyn also filed an affidavit as cause, stating that he believed an apportionment would operate against the intention expressed in the will of Laurence Comyn. That the petition for sale was not presented for the purpose of a *bona fide* sale, but for the purpose of getting possession of such portion of the funds bequeathed by the will of Laurence Comyn as the said P. S. Comyn could establish a claim to, and thus, in effect, of setting aside the said will, and the said deed of compromise. P. S. Comyn filed an answering affidavit to that of the said Andrew Martyn, in which he swore that, in his opinion, the said Andrew Martyn could not be injuriously affected by the apportionment, but that if the cause shown in the affidavit of the said Andrew Martyn were allowed, it would seriously damage the sale of the estate; and that Andrew Martyn was entirely unacquainted with the property in question, having never visited it. That the rent was never in arrear for twenty-three years; and that there were more than 5400 acres of land in the property, which, by the last Ordnance valuation was estimated at £750 a-year, but which actually produced £1100 per annum. That the lease was purchased in the year 1799, for £4250, since which time property had greatly in-

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creased in value. That the present rental of the lands of Seller-namore was about £826 per annum, and that of the lands of Spiddle £246 per annum.

Mr. *James Murphy* (with him Mr. *M. Morris*), for the owner.

The 72nd section of the 21 & 22 *Vic.*, c. 72, makes it discretionary with the Judge to apportion rent as between landlord and tenant; and he should do so unless he sees that some disadvantage will accrue to the landlord. It would nullify the Act if mere opposition of the landlord were sufficient to prevent an apportionment.—[LONGFIELD, J. No doubt, mere opposition is not sufficient.]—The Court should only see whether it is reasonable to expect that the landlord will sustain any inconvenience: *In re Hughes* (a); *In re Halburd* (b).

Mr. *Flanagan*, for Andrew Martyn.

Under the 37th section of the old Incumbered Estates Act (c), the Commissioners had no jurisdiction in the case of an unincumbered estate; and the section in the present Act is almost literally copied from the old Act; it may, therefore, be doubted whether the Legislature intended to extend the power to unincumbered estates. But if it be now discretionary with the Court, it ought to exercise that discretion with more caution than before. This is not an application for *bona fide* sale. The 72nd section of the last Act is very peculiar; \* and the words in parenthesis shows that the Court should deal with the greatest consideration for the rights of the landlord. In bad times, bad land suffers first.

(a) 4 Ir. Jur. 152.

(b) Mac. Landed Estates Prac. 138.

(c) 12 & 13 *Vic.*, c. 77, s. 37.

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\* "Where it is intended to sell, under this Act, a part only of any lease in perpetuity, or other lease, it shall be lawful for the Court, where it shall think fit, and (having regard to the rights and interests of the owner of the reversion) it shall appear to the Court just so to do, to apportion the rent reserved by such lease between the land to be sold and the remainder of the land," &c.

Mr. *E. Beytagh*, for F. Comyn, relied on the fact that the proceedings for sale in this case were not *bona fide*, and that the order, if made absolute, would frustrate the intention of the will of Laurence Comyn.

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Mr. *M. Morris*, in reply.

The owner is of course entitled to sell ; and as between himself and his brother there can be no question, as the Court would apportion between them as a matter of course. The words in parenthesis, cited by Mr. *Flanagan*, were introduced to show that the apportionment was to bind the landlord as well as the co-lessees.

LONGFIELD, J.

In this case the petitioner has obtained a conditional order for an apportionment (to bind the landlord) of the rent payable by him, out of the portion of a lease, of which he has obtained an order for sale in this Court. Cause against making the order absolute has been shown by the landlord Andrew Martyn, and by Mr. Francis Comyn, the owner of the residue of the leasehold interest. The case has been very ably argued on all sides ; and I think all the facts and arguments have been fully and clearly stated. The lands now held by the petitioner, and by the respondent Francis Comyn, were demised in 1777, by Oliver Martyn, to a person of the name of Lynch, at a rent of £380, late currency. Laurence Comyn, at the close of the last century, purchased the tenant's interest for a sum of £4250. He bequeathed separate portions to his sons. The petitioner is now the absolute owner of one portion, and has obtained an order for sale ; and now seeks for an order, under the 72nd section of the Landed Estates Court Act, to have the rent apportioned. The head-rent is £380, late currency ; the Ordnance valuation about £800 ; the gross rents about £1200, and the value of the petitioner's interest is £246 a-year.

Judgment.

The proceeding is not one of very frequent occurrence. By the 72nd section of the Act by which this Court is founded, which is in its terms precisely the same as the 37th section of the Act

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*L. E. Court.*  
*In re*  
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 ESTATE.  
*Judgment.*

which created the Incumbered Estates Court, a power is given to the Court to alter the contract between landlord and tenant. The power to alter a fair contract had never previously been given to any Court; but now, by the section of the Act which I am called upon to administer, the Court has the power of making an alteration in the position of the parties, which will diminish the security which, under the original contract, the landlord possessed for the recovery of his rent. The difference proposed to be made is this:—at present the estates of the two brothers are jointly liable for the entire of the rent: the effect of the order sought for by the petitioner would be to make the estate of each brother separately liable for his own proportion only. The landlord, and the owner of the other moiety of the leasehold interest, both appear to oppose this change. I shall consider their arguments separately. One argument, indeed, which would have been invincible under the ancient law, is deprived of all its force by the Act of Parliament. The landlord can no longer assert that it is more in accordance with his wishes to receive the rent in one sum from one man; and, therefore, the lease must not be thus divided. No arguments can prevail which will apply with equal force to every case, and which are therefore rather against the policy of the Act than against any particular mode of administering it. The consent of the landlord is not necessary; but the Court requires that it shall be clearly shown that his interest is not in any appreciable degree made less secure, or less enjoyable, or less marketable, than before. On the point of security, it is urged, on the part of the landlord, that the head-rent is £351; the Ordnance valuation is about £800; the rent payable by the undertenants, who are poor and numerous, is less than £1200 a-year; and that some of the land is ten, and some of it thirteen, miles from the town of Galway. I think that the security is ample, and that there is no reasonable ground for apprehending that either portion of the land will ever prove an insufficient security for the rent to which the landlord is entitled. As to the condition of the tenantry, and the subdivision of the land, there is not much difference between the two portions into which the estate is divided. I should not be

disposed to grant an apportionment, if one portion of the land was so circumstanced that the landlord would naturally be disposed to resort to it alone for payment of the entire head-rent. Next, with respect to the enjoyment of the reversioner's interest, it is undoubtedly true that one large rent is a more desirable property than several small rents equally well secured, and of the same aggregate amount. Still the Act does contemplate the division by the Court of one rent into two smaller rents; and it is for the Court to consider whether the splitting of the entire rent into smaller parts is any substantial inconvenience to the landlord in this particular case. On this point I am referred to *Halburd's case* (a); and, on reading the order, I perceive that in that case I divided a rent of £120 a-year into two equal rents of £60 each, the security being about the same as in the present case; and in the present case the smaller of the two portions into which the rent will be divided will probably exceed £70.

With respect to the marketable value, it is urged that the divided rents would not fetch so high a sum as the single large rent. On this point I can say that, after eleven years' experience, and selling many millions' worth of property, I believe that, if the landlord were bringing his estate into this Court for sale, one of his first steps would probably be to apply for an order to apportion the rent among the tenants, for the purpose of selling it in smaller lots; and the motion would, no doubt, be supported by strong affidavits to show that such an apportionment would considerably enhance the value of the estate.

It is next urged that this is an incumbered estate, and that this, power, which was first given to the Court for the Sale of Incumbered Estates, was, by copying the section of the old Act, given inadvertently, even where the estate was not incumbered. I cannot accept this doctrine. I must rather judge of the intentions of the Legislature from the language of the Act, and suppose that, having found great benefit given to the country by the free transfer of land under the Incumbered Estates Court, the Legislature supposed that still greater benefits would be derived, if all the same powers were

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Judgment.

(a) M'Nev. Prac. 138.



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*In re*  
**COMYN'S**  
**ESTATE.**  
*Judgment.*

extended to the sales of unincumbered estates. It can make no difference to the landlord that the tenant does not mortgage his estate to some third party before he makes this application. If his interests are not injuriously affected, he has no reasonable ground of complaint. If the order could inflict any injury, it ought not to be made, whether the land be incumbered or not. It is next urged, by both the respondents, that the power of apportionment was given to the Court only for the purpose of a sale, and that no sale is seriously intended in this case. There certainly are some suspicious circumstances in the transaction, but I shall meet this objection by the form of my order.

The objection of the second respondent Francis Comyn is founded upon the will of Laurence Comyn, under which the petitioner Peter Comyn, and the respondent Francis Comyn, derive their respective titles. By this will, Laurence Comyn, after giving separate portions of this leasehold interest to his two sons, bequeathed a sum of £11,000, late currency, in the  $\text{£}3\frac{1}{2}$  per cent. stock, for the purpose of paying the head-rent, or, if practicable, of buying the lessor's interest; the residue, if any, to be divided equally between his two sons. A change, not contemplated by the testator, has occurred. The head-rent was £380, late currency. The dividend on £11,000, of  $\text{£}3\frac{1}{2}$  per cent. stock, was £385, leaving a surplus of £5. But the  $\text{£}3\frac{1}{2}$  per cent. stock has been converted into a £3 per cent. stock, and there is now a deficiency instead of a surplus, unless there should be a poor-rate of more than 5s. 3d. in the £1. Mr. Francis Comyn asserts that the real object of the petitioner is to separate his interest in the land, and in the money, from that of his brother, in order that he might apply to the Court of Chancery to receive that portion of the money which is now impounded to pay his proportion of the rent, and this would injure him, as one of the trusts of the money is to buy the landlord's interest, and that it is possible that Mr. Martyn might be willing to sell the entire rent, and yet be unwilling to sell Mr. Francis Comyn's proportion of it only. I cannot yield to an argument founded on such uncertain speculation. It is certainly possible that the landlord might be willing to sell the whole, and yet unwilling

to sell a part of his estate. On the other hand, it is equally possible that he might be willing to sell a part, and yet unwilling to sell the whole; and there is a third contingency, which appears to be the case at present, viz., that the landlord has no intention to sell either the whole or any part of his estate. But I have nothing to do with the disposal of the money. If the petitioner wants to get any part of it he must apply to the Court of Chancery. If the application fails, then the argument of the respondent also fails, since the result which he dreads does not take place. On the other hand, if the petitioner succeeds in getting the money from Chancery, that is a proof that it is just and reasonable that he should do so, and, therefore, that the respondent has no ground of complaint. I feel, therefore, constrained to make the conditional order for apportionment absolute. No costs as between the tenants, as the apportionment is for their mutual benefit. The landlord is entitled to his costs, as his legal rights are interfered with for the petitioner's benefit, and to a duplicate of the final order for apportionment under the seal of the Court. Let the final order for apportionment not be sealed until the conveyance to the purchaser is ready for execution. If the petitioner applies for liberty to bid, or if the petition is dismissed for want of prosecution, let the order for apportionment be discharged, with costs, to be paid by the petitioner to both the respondents. If the two tenants do not agree upon a valuator, let them bring the names of their valutors before me, and I shall appoint one or two. The valuation must be made according to the value at the present time; but if any change in the relative values of the estates of the two brothers has taken place since the decease of Laurence Comyn, let the circumstance be specially reported.

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L. E. Court.  
*In re*  
COMYN'S  
ESTATE.  
Judgment.

1861.  
*Chancery.*

M'TEAR v. M'DOWELL.

(*In Chancery*).

Feb. 19, 20.

A testator gave all his property, real and personal, to trustees, and directed that they should sell his freehold estate, and make up an account of his estate, so that they might be able to make a division among his nine children, to whom he left the same in equal shares. After other directions, he declared that he left the shares of his daughters to them, for their respective lives, free from the control of their husbands, with power to appoint the same among their children, notwithstanding coverture. In a subsequent clause he directed that the shares of his sons who should have

attained twenty-one, at the time of his death, should forthwith vest in them; and that the shares of the other sons should vest as they should afterwards respectively attain the age of twenty-one years; and the shares of daughters, on marriage; and that the shares of sons who should die under twenty-one, and of daughters who should die unmarried, should go amongst the survivors as therein mentioned. J., one of the testator's daughters, married, and died without having exercised her power of appointment, leaving one child.—*Held*, that J. took an absolute interest in her share of the fund.

THIS case came before the Court upon a special case, stating that Alexander M'Laine, by his will, dated the 17th of August 1849, bequeathed to the petitioner and to Nicholas Fitzsimons and Richard Langtry all his property, real and personal, upon the trusts and for the purposes thereafter mentioned; and, after bequeathing to his wife an annuity of £150 a-year, and making certain provisions for the management of his property, he directed that his trustees should sell his freehold estate, and make up an account of his estate, so that they might be able to make a division or allocation thereof amongst his nine children, viz., Jane, John, Alexander, Martha, Susanna, Robert, George Langley, Lachlan and Helen, to, between and amongst whom he left and bequeathed the same, in equal shares; and after certain other directions the testator proceeded as follows:—  
 “And as to the shares of my estate hereby bequeathed to my daughters, I hereby leave the same to them respectively, for their respective natural lives, free from the control, debts or engagements of any husbands they may respectively marry, and with power to them to bequeath or appoint the same, by deed or will, among their children, in case of marriage, as they may see fit, notwithstanding coverture.” Then, after certain provisions for the maintenance of his children during their minority, the testator proceeded:—“And I further order and direct, that the shares of such of my children, of my said estates and effects, as being sons, shall have attained the

age of twenty-one years, at the time of my decease, shall forthwith vest in them; and that the shares of the others of them, being also sons, shall also vest, as they shall afterwards respectively attain said age; or, in case of daughters, on day of marriage, but not sooner or otherwise; and that, in the meantime, the share or shares, as well original as accruing, of such of the said children as being sons shall die under the age of twenty-one years, or, as being daughters, shall die unmarried, shall go to, between and amongst the survivor or survivors of them, in equal shares and proportions, as tenants in common." The testator named the trustees his executors, and died in 1856. Probate was granted to the trustees.

Susanna M'Laine died under age and unmarried. Jane M'Laine, in 1858, married Edward M'Dowell, and by her settlement professed to assign to trustees her accruing share of Susanna's one-ninth. Jane M'Laine died in 1859, leaving her husband, the said Edward M'Dowell, and one child, a daughter, the respondent Jane M'Dowell, surviving, but having bequeathed to her husband all property which she had power to bequeath or devise. This will was duly proved by Edward M'Dowell.

Mrs. M'Dowell's share having been claimed by her husband, by her daughter, and by the next-of-kin of the testator, the petition in this case was presented, to ascertain the person entitled.

Mr. *Arthur Sharman Crawford*, for the petitioner, submitted to act as the Court should direct.

Mr. *David Pigot*, for Mr. M'Dowell.

Mrs. M'Dowell was absolutely entitled, in default of appointment to the children, and her husband is, therefore, entitled: *Re O'Reilly* (a); *Lassence v. Tierney* (b); *Findon v. Findon* (c); *Blackmore v. Ince* (d); *Magee v. Townsend* (e); *Hulme v. Hulme* (f); *Campbell v. Brownrigg* (g). There is nothing to give

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(a) 1 Ir. Chan. Rep. 497.

(b) 1 M'N. & G. 551; S. C., 2 H. & T. 115.

(c) 1 De G. & J. 380.

(d) 1 De G. & J. 458.

(e) 3 Beav. 443.

(f) 9 Sim. 644.

(g) 1 Phil. 301.

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the children an implied estate in default of appointment. *Harding v. Glynn (a)*, *Brown v. Higgs (b)*, *Kennedy v. Kingston (c)*, *Witts v. Boddington (d)*, are all distinguishable from this case. Where there is a prior power to appoint the estate, without any expression of wish or desire by the testator, there can be no estate implied from the existence of the power, and the Court cannot interfere.

Mr. *Arthur Jackson*, for Jane M'Dowell, daughter of Mrs. M'Dowell: *Brown v. Higgs (e)*; *Burrough v. Philcox (f)*; *Jarman on Wills*, p. 461; *Mason v. Lymberry (g)*; *Witts v. Boddington*; *Kennedy v. Kingston (h)*; *Birch v. Wade (i)*; *Forbes v. Ball (k)*.

Mr. *Andrews*, for the next-of-kin: *Gompertz v. Gompertz (l)*; *Crossling v. Crossling (m)*; *Marlborough v. Godolphin (n)*; *Jackson v. Forbes (o)*; *Eyre v. Marsden (p)*; *Leeming v. Sherratt (q)*.

#### THE LORD CHANCELLOR.

*Judgment.*

I am very clearly of opinion that this fund does not go to the next-of-kin of the testator. The bequest appears to me to come within the principle of *Lassence v. Tierney (r)*, and other analogous cases mentioned in the argument; there being evidence, on the whole language and construction of the will, of the testator's intention to give the legacy absolutely as between his estate and the legatee. In the first instance the property was given amongst all the sons and daughters, in equal shares and proportions, in terms

(a) Atk. 469.

(b) 4 Ves. 708; S. C., on appeal, 5 Ves. 495.

(c) 2 J. & W. 431.

(d) 3 Bro. C. C. 95; S. C., 5 Ves. 503, from *Reg. Lib.*

(e) 4 Ves. 708.

(f) 5 M. & C. 72.

(g) 2 Sug. Pow. 165.

(h) 2 J. & W. 431.

(i) 3 Ves. & B. 198.

(k) 3 Mer. 434.

(l) 2 Phil. 107.

(m) 2 Cox, 396.

(n) 2 Ves. 61.

(o) Tamlyn, 88.

(p) 2 Kee. 573.

(q) 2 Har. 14.

(r) 1 Mac. & G. 551.

which would confer upon them the absolute interest; so that if it rested there they would, of course, have taken their respective shares out and out; but the will then proceeds to declare, that the shares given to the daughters were left for their respective natural lives; and if the will stopped there, some difficulty might be created; but the whole will must be taken together: and, when we go further, it would appear that the testator's real meaning was not to cut down the absolute interest to an estate for life, but to prescribe the mode of enjoyment in the event of the daughter marrying; for he goes on, "free from the debts, control or engagements of any husbands they may respectively marry, and with power to them to bequeath or appoint the same, by deed or will, among their children, in case of marriage, as they may see fit, notwithstanding coverture." There is no general intention manifested there of cutting down the interest to an estate for life; there is no general power given; what is conferred on them is a limited power of a very curious kind, which seems intended to be exercised, not during their entire lives, but only during coverture. That seems to be the true construction, from what went before it; he provides merely for what might occur during coverture, and means to give the daughters power, in case of their death while married, to divide their respective shares among their children: so that it would appear that his intention was merely that they should be free to exercise their power of disposition amongst their children, free from marital control, and that for this reason the power is confined as I have stated.

This construction is supported by the next clause, in which he directs that the shares of "such of my children of my said estate and effects as, being sons, shall have attained the age of twenty-one years, at the time of my decease, shall forthwith vest in them." What is the meaning of that? It means that they shall become absolutely entitled; for there is not any other meaning which could there be attributed to the word "vest." Then he goes on, "and that the shares of the others of them, being also sons, shall also vest as they shall afterwards respectively attain said age, or, in case of daughters, on day of marriage, but not sooner or otherwise." Now what is to vest in the daughters? The share of the property which

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he had given to them, in the mode to which I before adverted, free from the control of their husbands, and in their power to dispose of for the benefit of their children. Then he goes on to say, "That, in the meantime, the share or shares, as well original as accruing, of such of the children as, being sons, shall die under the age of twenty-one years, or, as being daughters, shall die unmarried, shall go to, between and amongst the survivor or survivors of them, in equal shares and proportions, as tenants in common." Thus the testator shows that he well knew how to frame a limitation over; and he has done so, but only in one event, and he has declared that if that do not happen the shares are to vest, or, as his prior use of that word shows his meaning to be, to become the absolute property of the legatees.

It never could have been the meaning or intention of the testator that, if his daughters were to die without having made an appointment in favour of their children, their shares were to go over; and no Court would give such a construction to a will, if not absolutely coerced by very strong words. *Lassence v. Tierney* (a) is a very strong case. The words there are much stronger than they are here. The testator there, after several legacies, proceeded:—"I give and bequeath to my only daughter, Catherine Reade, the residue of my property, wheresoever and whatsoever, to receive the interest thereof during her lifetime . . . . . without being subject to any control or restraint from her present or any future husband." He then went on to direct that she should not have power to dispose of any part of the property during her life, and that, after her decease, it should be divided between her children, in the way therein mentioned. In that case, it is true that the decision was that Catherine Reade did not take the absolute estate in the property; but the Lord Chancellor says, "If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails." Now applying that rule here, it is manifest that the restrictions imposed are merely for the benefit

(a) 1 M. & G. 551.

of the legatee and of her children, if any. The Lord Chancellor then went on:—"But, if there be no absolute gift, as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having, in such event, been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy." Can we say here that the gift was only for a particular purpose, when there was, first, a bequest of the shares, in terms sufficient to give an absolute interest, then a direction as to the mode of enjoyment during their lives, with a power afterwards, and, finally, an express direction that the share should vest in an event which has happened? Lord Cottenham proceeded:—"In every case, therefore, the question must be one of construction; and, except for the purposes of such construction, very little assistance can be derived from former decisions. It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift." A similar doctrine is laid down in *Gompertz v. Gompertz (a)*; though in that case the Court decided that the next-of-kin were entitled; but Lord Cottenham says:—"If he had afterwards done no more than direct how the shares so given were to be laid out and enjoyed, the case would have fallen within the principle of those cited; but the subsequent directions relate not to that, but to the nature and substance of the gift itself; for whenever, in the course of these directions, the testator refers to the shares of his daughters, it is always accompanied with an explanation of the sense in which he means to use the word; that is a life interest only, with remainder to their children." That cannot be predicated of the shares here; in no part of this will are the shares spoken of in this limited way.

There is another very late case, *Re Corbett's Trusts (b)*, which is perhaps nearer the present, in its terms, than any other which can

1861.  
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Judgment.

(a) 2 Phil. 107.

(b) 1 Johns. 591.



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*Chancery.*  
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*Judgment.*

be found. In it "The testator bequeathed £3000 to trustees; as to £1000, upon trusts in favour of his daughter Elizabeth, identical with the trusts hereinafter stated as to Sarah Dollett; as to £1000, on similar trusts for his daughter Mary;" and then proceeded as follows:—"And as to £1000 principal, remainder of the said £3000, and the interest and dividends arising from the said £1000, in trust for my niece Sarah Dollett, and to pay and apply the interest and dividends thereof, from time to time, to and for her benefit, until she shall attain her age of twenty-one years or marriage, which shall first happen; and, upon her attaining that age or marriage, I direct one moiety of the said principal sum of £1000, or the funds and securities whereon the same shall be then invested, to be paid or assigned to my said niece, absolutely;" and, as to the other moiety, in trust to pay the interest to the representatives of the niece for life; and, from and after her decease, he directed the trustees to stand possessed of this moiety, in trust for all and every the child and children of Sarah Dollett, with various provisions and limitations over, as to the children. There, there was, in the beginning, the declaration of trust for the niece, followed by far more express and precise limitations than any here contained; and Vice-Chancellor Sir Page Wood decided that the will, so far as it went in regard to the children, if it had stopped there, would have conferred an absolute interest on the heir, in default of children, saying:—"It seems to me that, if the will stopped there, the trust for Sarah Dollett would be sufficient to bring the case within that class of authorities where gifts of this kind, modified by subsequent limitations, have been treated as absolute gifts, subject only to such modifications; so that, on those subsequent limitations failing, the original gift remains in force. I think that would be so on the terms of the gift itself." There was, however, a subsequent limitation, which he held to be effectual in the event which had occurred; but, if the will had stopped with the limitation to the children, it would, in his judgment, have conferred an absolute estate in Sarah Dollett.

There is another case which, perhaps, is still stronger—*Bell v. Jackson* (a), where the testator made the following bequest:—"I

(a) 1 Sim., N. S., 547.

give to my grand-daughter, Elizabeth Biddles Noon, the sum of £4000, to be paid on her attaining the age of twenty-one years; and I direct my executors to place the same out at interest, and apply a competent part of such interest for her maintenance, education and advancement, until she shall attain that age." The testator afterwards made a codicil, by which he directed that Elizabeth Biddles Noon should have only the interest of £2000 until she attained twenty-three, and proceeded, "The interest of the other £2000 I direct my executors to put out to interest, so that it may become principal; and, at the time of the said Elizabeth Biddles Noon arriving at the age of twenty-three years, I hereby direct my executors to have the whole settled upon her for her life, and, after death, to her child or children, in equal proportions, so that no husband of hers may spend it." In that case, Vice-Chancellor Lord Cranworth held that the limitation to the children was merely carved out of the absolute interest previously conferred on Elizabeth Biddles Noon; so that, if she never had children, her interest was not affected. Looking at the principle of the decisions to which I have referred, and also looking to the very strong language of this will, I think that the next-of-kin of the testator have failed to establish any right to this fund as undisposed of by his will.

The question then arises, whether there is any trust for the children of this lady, or any implied limitation to them in default of appointment? I do not think that any such trust or limitation can be discovered in the will. There is a mere naked power of appointment given to the daughter; but no limitation over in default of appointment—nothing to show any intention to give the property to the children; and, therefore, however I may guess that it was the intention of the testator that the children should take, I am bound to hold that he has failed to express any such intention; that he has only conferred upon his daughter a power which she was at liberty to exercise, or to abstain from exercising, and that Mr. M'Dowell is entitled to this fund. There is no question raised respecting the right to the accrued fund.

1861.  
*Chancery.*  
M'TEAR  
v.  
M'DOWELL.  
*Judgment.*

*Chancery Hearing Book, 27, f. 34.*

1861.  
Ch. Appeal.

**Court of Appeal in Chancery.**

**In re the Estate of LAWDER, Assignee of Irwin, *Owner* ;  
HILL and DOWLING, *Petitioners*.**

*Feb. 4, 5.*

A testator, by his will, made in 1836, executed a power of appointing among his younger sons a sum of £2000, charged, by his marriage settlement, on the lands of H., of which he was tenant for life. After his death, his eldest son, who took the lands of H. as tenant in tail, conveyed them, in 1837, to trustees, to secure a sum of £1600 by way of mortgage; the younger sons being parties to the mortgage, and consenting thereby to postpone their claims to it; and, at the same time, the elder son executed his bond collateral, for securing the same sum, and warrant, upon which judgment was entered. In 1841, the eldest son purchased the lands of F.; and, in 1845, a judgment was obtained against him by S. The lands of H. and F. were subsequently sold in the Landed Estates Court; and the proceeds of H. having proved insufficient to pay the amount due on foot of the mortgage, it was ordered, by a Judge of that Court, that the mortgage debt should be paid rateably out of the proceeds of H. and F., and the surplus of H. applied in discharge of the appointees' claims, and the surplus of F. in discharge of the judgment of 1845.

By deed of settlement, executed on the marriage of John Richard Irwin, in 1826, his father conveyed the lands of Harristown to trustees, to the use of himself for life, with remainder to John Richard Irwin for life, with remainder to John Richard Irwin's first and other sons, as tenants in tail; and, by the same deed, the lands were charged with a sum of £2000, as a provision for the younger children of the marriage, as John Richard Irwin should appoint.

John Richard Irwin, by his will, dated the 26th of July 1836, appointed the £2000 among his three younger sons thus; £500 to Richard, £1000 to John, and £500 to Lewis. In August 1836, John Richard Irwin died, and his eldest son, Thomas Rodney Irwin, entered into possession of the lands. In 1837, Thomas Rodney Irwin, for the purpose (among others) of paying off the sum of £1000, so appointed to John Irwin, borrowed a sum of £1600 from William Woodroffe; and by deed of mortgage, dated the 7th of February 1837, he conveyed the lands of Harristown to trustees, to secure payment of the same; and at the same time he gave them, as collateral security, his bond and warrant for the same amount, upon which they accordingly entered judgment.

This Court, upon appeal, reversed that decision, being of opinion that no equity had arisen upon the purchase of F., in favour of the appointees under the will, so as to entitle them to insist upon the mortgagee's claim being paid rateably out of the proceeds of H. and F.; and that, consequently, the doctrine of marshalling did not apply.

*Barnes v. Raxter* (1 Y. & Col., Ch. Cas., 401) commented on.

ment. Richard and Lewis Irwin were parties to the mortgage deed, and thereby agreed that the sum of £1600 thereby secured should be an incumbrance upon the lands, prior to their respective shares of the charge of £2000.

In 1841, Thomas Rodney Irwin purchased the lands of Flower Hill; and, in 1845, Richard Irwin obtained a judgment against him, in the penal sum of £700, which judgment now vested in Arthur Stanley, the appellant.

In 1853, Hill and Dowling, the trustees of the mortgage of 1837, filed a petition in the Incumbered Estates Court for a sale of all the lands. The lands were subsequently sold in the Landed Estates Court; and the proceeds of the sale of Harristown proving insufficient to discharge the mortgage debt, Richard Irwin and the representatives of Lewis Irwin (appointees under the will of John Richard Irwin) claimed to have the securities marshalled. Judge Dobbs, on the 17th of August 1860, ordered that the amount due on foot of the mortgage of 1837 should be paid rateably out of the proceeds of the sales of Harristown and Flower Hill, and that the residue of the proceeds of Flower Hill should be applied in payment of Stanley's judgment debt; and the residue of the proceeds of Harristown in payment of the claim of Richard Irwin and the representatives of Lewis Irwin.

Against that order the present appeal was brought by Arthur Stanley, upon the following grounds:—First; that the claimants were, by the contract made by them upon the execution of the mortgage of 1837, disentitled from having the lands of Harristown exonerated from the payment of any portion of the mortgage debt.

Secondly; that the claimants, not being creditors of Thomas Rodney Irwin, the owner of Flower Hill, were not entitled to have the proceeds of the sale marshalled in their favour.

Thirdly; that the appellant, having a statutable charge upon the lands of Flower Hill, by virtue of the judgment of 1845, was entitled to be paid the same in due priority to all claims, except that for the balance due on foot of the judgment collateral with the mortgage of 1837.

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Statement.

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*Ch. Appeal.*

*In re*  
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ESTATE.

*Argument.*

The *Solicitor-General*, Mr. *Brewster* and Mr. *Harkan*, for Arthur Stanley, the appellant.

This case must be decided upon the construction of this contract. The doctrine of marshalling does not apply. The cases are collected in *Aldrich v. Cooper* (a). In *Ex parte Kendall* (b), Lord Eldon said (p. 520):—"We have gone this length; if A has a right to go upon two funds, and B upon one, having both the same debtor, A shall take payment from that fund to which he can resort exclusively; that, by those means of distribution, both shall be paid. That course takes place where both are creditors of the same person, and have demands against funds the property of the same person. Here, it is true, there may be creditors who have demands against the four, and others who have demands against the one; but it was never said that, if I have a demand against A and B, a creditor of B shall compel me to go against A, without more; as, if B himself could insist that A ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety; to the intent that all the objections arising out of these complicated relations may be satisfied: but if I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if not founded on some equity giving B the right, for his own sake, to compel me to such payment from A."—[The LORD JUSTICE OF APPEAL. That is the principle upon which we acted in *Re Keily* (c).]—In this case, no equity ever arose in favour of the appointees under the will, giving them a right to compel the mortgagees to seek payment of their debt, or a rateable portion of it, from the Flower Hill estate. Judge Dobbs appears to have acted upon the authority of *Barnes v. Racster* (d). But that case was different; for there, there was a common debtor. In *Gibson v. Seagrim* (e), the Master of the Rolls, in his judgment, gives (p. 619) a good rendering of *Barnes v. Racster*; "I agree with what was decided by the Vice-Chancellor Knight Bruce, in *Barnes v. Racster*, that if two estates are mortgaged to A, and one is afterwards mortgaged to B, and the

(a) 2 W. & T., L. C., 56.

(b) 17 Ves. 514.

(c) 6 Ir. Chan. Rep. 394.

(d) 1 Y. & Col., C. C., 401.

(e) 20 Beav. 614.

remaining estate is afterwards mortgaged to C, B has no equity to throw the whole of A's mortgage on C's estate, and so destroy C's security. As between B and C, A is bound to satisfy himself the principal, interest and costs due to him out of the two estates rateably, according to the respective values of such two estates; and thus to leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon."

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Argument.

Mr. Serjeant *Sullivan* and Mr. *P. J. Blake*, for Richard Irwin, and the representatives of Lewis Irwin.

*Barnes v. Racster* is a precise authority in support of the decision in the Landed Estates Court. Thomas Rodney Irwin covenanted in the mortgage deed to pay the charges, thereby becoming a direct creditor to Richard and Lewis. The effect, therefore, of that deed was to charge the two sums of £500 each upon the lands, subject to the mortgage.—[The LORD CHANCELLOR. They were always charged upon the lands.]—But he directly covenants with these parties to pay them their portions, and the interest on them, thereby making himself directly their debtor. The effect of the mortgage deed was, even if the £2000 charge had never existed, that Thomas Rodney Irwin had, for value received, charged the lands with those two sums, and covenanted to pay them, as if he had in fact given a mortgage for those two charges. The mortgagee had also a collateral judgment; and the moment Thomas Rodney Irwin acquired Flower Hill, Richard and Lewis had a right, as between them and Thomas Rodney Irwin (not, perhaps, against a purchaser for value, but certainly as against the judgment creditors of Thomas Rodney Irwin), to have the mortgage and judgment paid rateably out of Harristown and Flower Hill, on the principle established by *Barnes v. Racster*. In that case, Racster had, in 1792, mortgaged Foxhall to Barnes. In 1792, he mortgaged the same estate to Hartwright; and, in 1800, he mortgaged both Foxhall and No. 32 to Barnes; and it was held that the actual circumstance of the first mortgagee having acquired a new mortgage over both estates gave Hartwright a right to throw the first mortgage rateably on both estates; and were it not that

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*Argument.*

there was a fourth subsequent mortgage, he would have had a right to have the entire of the first mortgage thrown on No. 82.—[The LORD JUSTICE OF APPEAL. That was the case of the same debtor, and different estates mortgaged for the same debt.]—The rule would be this, that, where a person mortgages an estate first to one party, and then to another, subject to the first mortgage, and subsequently makes another estate subject to the first mortgage, then the second mortgagee has a right to have the first mortgage paid *pari passu* out of both estates: *In re Cornwall* (a). In the present case, the mortgagee could have proceeded on his collateral judgment, in the first instance, if he pleased, and have had Flower Hill sold first.—[The LORD CHANCELLOR. The acquisition of Flower Hill was no part of the contract; but, in *Barnes v. Racster*, the mortgagor in effect contracted with the second mortgagee to give him a security, and that he would pay him out of it if he could; and his giving a new mortgage to the first mortgagee gave him the means of paying the second mortgage out of the first estate.]

They also cited *Bugden v. Bignold* (b); *Tidd v. Lister* (c); *Heveningham v. Heveningham* (d); *Hyde v. Atkinson* (e).

Mr. *Brewster*, in reply.

The respondents here agreed that they would not look to Harris-town for payment of their claims, until the mortgage had been paid out of it. The liability of suretyship is a common liability to a common demand: *In re Keily* (f). Although the mortgagee might have availed himself of any of his securities, that fact does not alter his primary fund; and, he having been paid off out of that, there is an end of both mortgage and collateral judgment. Richard Lewis Irwin could not, at any time, have said to the mortgagee, "Mr. Irwin has now another estate, Flower Hill; proceed against it, and you will be paid your demand." In *Barnes v. Racster*, when Racster, having mortgaged to Barnes, then mortgaged to Hartwright, and then gave Barnes a mortgage over a separate estate, for the

(a) 6 Ir. Eq. Rep. 63.

(c) 10 Hare, 140.

(e) 2 Ir. Chan. Rep. 246.

(b) 2 Y. & Col., C. C., 377.

(d) 2 Vern. 255.

(f) 6 Ir. Chan. Rep. 394.

same debt, that was in effect a payment *pro tanto* of the original debt; but where, instead of the party giving a mortgage on a second estate, the law attached the original debt to that second estate, that is no stipulation on the part of the owner that any of the debts shall be satisfied out of the second estate.

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*Argument.*

**The LORD CHANCELLOR.**

It is an old and well established doctrine, that, if the owner of two estates mortgages them both to one person, and subsequently mortgages one of the same estates to another person, an equity arises, on the part of the person who has a mortgage on one estate only, to throw the demand of the first mortgagee upon the estate of the two, upon which the second mortgagee has not a mortgage. That is the principle recognised in all the cases which have been cited, and particularly in *Gibson v. Seagrim* (a). In that case, Sir Samuel Romilly entered fully into the subject, adopting the principle of *Aldrich v. Cooper* (b), while, at the same time, he expressed his concurrence in the subsequent decision in *Barnes v. Racster* (c). The facts of *Gibson v. Seagrim* were shortly these:— In 1851, Seagrim mortgaged certain real estates to Johnson. In 1852, he mortgaged the same estate to Godwin, transferring to him, at the same time, the shares in the Winchester Gas Company, by way of additional security. In 1853, he mortgaged all the lands, including those in the former mortgage, to Gibson; but the gas shares were not comprised in this security. The first mortgagee subsequently sold the real estate included in his mortgage, and, after paying himself, handed over the surplus to the second mortgagee, Godwin, who applied it in payment of his mortgage debt; and then, having sold the gas shares, paid himself in full, and handed over the balance to the assignees of Seagrim, who had become a bankrupt. Gibson applied to have this balance applied in satisfaction of his debt, in lieu of the surplus of the proceeds of the real estate intercepted by Godwin. Thus, at the time when Johnson's mortgage was paid off, the parties stood thus; Godwin

*Judgment.*

(a) 20 Beav. 614.

(b) 3 Ves. 381.

(c) 1 Y. & Col., C. C., 401.



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**ESTATE.**  
*Judgment.*

had a mortgage on two estates, namely, the real estate and the gas shares; and Gibson had a mortgage on the real estate only. The Master of the Rolls, in his judgment, having expressed an opinion that the two estates ought to be marshalled, in accordance with the principle laid down in *Aldrich v. Cooper*, and that class of cases, said, "But I agree with what was decided by the Vice-Chancellor Knight Bruce, in *Barnes v. Raester*, that, if two estates are mortgaged to A, and one is afterwards mortgaged to B, and the remaining estate is afterwards mortgaged to C, B has no equity to throw the whole of A's mortgage on C's estate, and so destroy C's security. As between B and C, A is bound to satisfy himself the principal, interest and costs due to him out of the two estates rateably, according to the respective values of such two estates, and thus to leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon."

*Barnes v. Raester* did not establish any new principle. It simply decided that, if there is a third mortgage in the case, affecting the estate, which one only of the two former mortgages affects, then the second mortgagee shall not be allowed to disturb the third mortgagee's right, by throwing the entire of the first mortgage on the second estate; and that in such case the first mortgage shall be paid rateably out of both estates. But in that case it was assumed that the former principle was established. In the case where an owner mortgages one estate first to A, and then to B, and subsequently gives A a mortgage upon a second estate, to secure the same debt, B's equity arises the moment the second mortgage to A is made. But, in the present case, we have to consider, not mortgages at all, in that sense, but judgments, which are totally different. Judgments, immediately on their acknowledgments, bound all the property of the conusor; and the question is, when did the right contended for on part of the judgment creditor, to have the securities marshalled, arise? It arose, if at all, the very moment the judgment was entered; therefore it follows, according to the argument on behalf of the respondents, that they might then have said to the mortgagees, "You must now proceed on your collateral judgment, and arrest your debtor, the mortgagor, or levy your demand by exe-

cution of his chattel property ;" in other words, " You must do the very thing which the mortgagor endeavoured to avoid, by borrowing the money "—a transaction to which the respondents themselves were parties. No new right rose upon the purchase of Flower Hill. Therefore the old doctrine of marshalling has no application to the present case. This is a mere question upon the contract in the case, and that contract plainly was, that the respondents would not seek to have their claims paid out of Harristown until the mortgagee's claim had been first satisfied out of that estate. I agree that, if it were once established that an equity existed between the respondents and the judgment creditors, then the rateable distribution sought for could be enforced, in accordance with the authority of *Barnes v. Racster*. The judgment of the Court below appears to me to have been, in this respect, founded on a misapprehension, and must be reversed.

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*Ch. Appeal.*  
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Judgment.

THE LORD JUSTICE OF APPEAL.

The respondents in this appeal were entitled to two charges, each for £500, portions of a charge affecting the lands of Harristown. They joined in a mortgage of these lands, giving the mortgagee priority. These lands have been sold for a sum not sufficient to pay the amount of the mortgage, so that nothing remained to pay the respondents, and the result is an extinction of their claims, and a total exoneration of the lands. But the order of Judge Dobbs has worked out a remedy—or, at least, a partial remedy—by making another estate, that of Flower Hill, which was acquired in the year 1841, four years after the execution of the mortgage, contribute to pay the mortgage debt, thereby releasing a portion of the proceeds of the sale of Harristown from the mortgage debt, and preserving and appropriating so much to the payment of the two charges of £500, thus restoring and giving back to the respondents the very property which they had released. It is obvious that such a process and such an operation is not the result of contract. Indeed it is the very reverse ; for, by the contract, the lands and purchase-money were, in the above events, absolutely released. Is there, then, any rule of Equity, which, without contract, and,

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*Judgment.*

indeed, in contravention of it, revives and reinstates these charges upon the proceeds of the estate? The reason or foundation of such an equity is not supplied by anything in the mortgage deed. The priority of the charges is unequivocally released, and the only remedy it provides is, that of the personal covenant in the mortgage. Again, there is no pretext for contending, nor has it been argued, that the relation of surety and principal arose between the owners of the charges and the mortgagees, which could entitle the former to the benefit of the collateral securities. On none of these grounds has the case been put. The decision of Judge Dobbs, holding that Harristown and Flower Hill should each contribute rateably to the discharge of the mortgage of £1600, is founded wholly on the authority of *Barnes v. Racster* (a). I am of opinion, however, that the present case is distinguishable from *Barnes v. Racster*, in essential particulars, and that the latter case is not an authority for the decision we are reviewing. A brief consideration and comparison of the facts of the two cases will make this clear. First, it will be seen that the mortgage made to Barnes, in the year 1800, comprised the two estates, Foxhall and "No. 32;" that is a leading fact, to be always kept in mind. Racster had, firstly, mortgaged Foxhall to Barnes in 1792; secondly, he mortgaged the same estate, Foxhall, to Hartwright in 1795; and, thirdly, in 1800, he mortgaged both Foxhall and the estate called "No. 32" to Barnes, to secure both the former debt and a further sum. The effect of this last deed, in improving the security of Hartwright, as it was held to do, was the result of the provision which made Barnes' earlier demand of 1792, as well as the new loan, a charge on *both* the estates of Foxhall and "No. 32." The decision in his favour, which threw the debt of 1792 partly on "No. 32," was the necessary effect of the *actual* agreement between Racster and Barnes, carried into execution by the deed of 1800. See how clearly this is laid down in the Vice-Chancellor's judgment (p. 408):—"As to the matter to be determined, the observation to be made is, that, considered without any reference to Hartwright or Williams, the nature and effect of the security of 1800 were, as I conceive, to

(a) 1 Y. & Coll., C. C., 401.

make 'No. 32' and Foxhall *pari passu*, and rateably according to their values, liable to Barnes' two charges;" and then he exemplifies this, by referring to the consequences, if the two estates had gone in different courses of descent. This *compact*, making both estates liable to contribution, is the sole reason and ground of the decision. We must, therefore, now consider whether, in the case before us, there was any agreement or compact that Flower Hill (which, I may say, corresponds to "No. 32" in *Barnes v. Racster*) was to be contributory or liable to pay the mortgage?

Flower Hill was not acquired by the mortgagor until 1841. This circumstance, though it may weaken the claims of the respondents, cannot make them stronger than they would have been if the mortgagor had possessed Flower Hill, when he executed the mortgage in 1837. Now let me consider for a moment what would have been the operation of the deeds of 1837, if he had, at that time, possessed Flower Hill? The mortgagees would only have had the mortgage, the covenant and the collateral judgment; but what ground would there have been for saying that, besides these remedies, he should have had his demand charged on Flower Hill as well as Harristown? Neither in the mortgage deed, nor elsewhere, is there a pretence for such a claim; yet it would be the actual conveyance of both, by way of mortgage, that could alone assimilate the two cases, and make the decision of *Barnes v. Racster*, in any degree, applicable to the case before us. The acquisition of Flower Hill, four years afterwards, which detaches it from the antecedent dealings, is not attended by any agreement, or any indication whatever of any intention, to make it liable to the mortgage debt; and thus this case is totally destitute of the very matter which would warrant the application to it of the decision in *Barnes v. Racster*.

Order reversed.

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*Ch. Appeal.*  
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ESTATE.  

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Judgment.

1861.  
*Ch. Appeal.*

In re the Estate of Sir JOHN NUGENT HUMBLE, Devisee of  
THOMAS JOSEPH FITZGERALD, *Owner and Petitioner* ;  
Ex parte JOHN MAGRATH, *Appellant*.

*May 28.*

An affidavit filed for the purpose of registering a judgment as a mortgage, under the provisions of the 13 & 14 Vic., c. 29, was entitled in the margin "J. M., of D., in the county of W., farmer, plaintiff; T. J. F., of B., in the county of W., Esq., defendant." The affidavit stated that J. M., of, &c. &c., had recovered a judgment "against the defendant in this cause, by the name and description of Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq."—*Held*, that the above was a sufficient description of the name and usual or last known place of abode of the defendant.

*Semble*, that a supplemental affidavit, filed under the provisions of the 21 & 22 Vic., c. 105, may be filed after the death of the consor.

THIS was an appeal on behalf of John Magrath, an incumbrancer upon the lands sold in this matter, against an order made by Judge Hargreave in the Landed Estates Court, by which he ruled that the affidavits filed for the purpose of converting a judgment into a mortgage, under the provisions of the 13 & 14 Vic., c. 29, were invalid.

John Magrath obtained a judgment in Trinity Term 1852, against Thomas Joseph Fitzgerald (the owner of the lands sold in this matter), for £400, besides £3. 1s. 11d., for costs; and on the 2nd of June 1853, proceeded to register the same as a mortgage against the said lands, under the 13 & 14 Vic., c. 29.

The affidavit filed for that purpose ran as follows:—

*"In the Court of Queen's Bench.*

<p>"John Magrath, of Doon, in the county of Waterford, farmer, Plaintiff; Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq., Defendant. And the Act of the 13 &amp; 14 Vic., c. 29.</p>	}	<p>John Magrath, of Doon, in the title hereof, in the county of Waterford, farmer, aged thirty years and</p>
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upwards, the plaintiff in this cause, maketh oath and saith that he, this deponent, by the name and description of John Magrath, of Doon, in the county of Waterford, farmer, did, on the 14th day of October, in the year of our Lord 1852, and in or as of Trinity Term, in the said year of our Lord 1852, obtain a judgment in Her Majesty's Court of Queen's Bench in Ireland, against the defendant in this cause, by the name and description of Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq., for the sum of £400 sterling, besides £3. 1s. 11d. for costs;

as by the records of said Court may fully appear. This deponent further saith he," &c.

The appellant subsequently, on the 25th of June 1859, filed a supplemental affidavit, under the provisions of the 21 & 22 *Vic.*, c. 105.\*

The lands were subsequently sold in the Landed Estates Court; and, upon the settlement of the final schedule of incumbrances, Judge Hargreave held that the affidavit originally registered was invalid, on the ground that it did not sufficiently state the title, trade or profession, or last known place of abode, of the person whose estate was intended to be affected thereby; and that the supplemental affidavit, having been made after the death of the conusor, could not supply the alleged defect in the first affidavit.

Against that decision the present appeal was brought, on the following grounds:—

First; that the first affidavit was a sufficient compliance with the 13 & 14 *Vic.*, c. 29.

Secondly; that even if the first affidavit was defective, such defects were supplied by the supplemental affidavit, inasmuch as there was no provision contained in the 21 & 22 *Vic.*, c. 105, requiring such supplemental affidavit to be made in the lifetime of the conusor; nor any reason for requiring such restriction in the construction of that Act of Parliament.

Mr. *T. Harris* and Mr. *Ryan*, for the appellant.

This affidavit substantially and sufficiently states the name, title, &c., &c., of the person against whom the judgment was obtained. The margin states that the defendant in the case was "Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq.," and the affidavit states that the judgment was recovered "against the defendant in this cause." A similar affidavit was held to be valid, by Judge Lynch, in the Court of Bankruptcy: *In re Smith and Ross* (a). They also cited *In re Goodyear* (b).

(a) 6 *Ir. Jur.*, N. S., 72.

(b) 6 *Ir. Jur.*, N. S., 11.

\* NOTE.—As the Court held the first affidavit to be valid, there is no occasion for setting forth the supplemental affidavit.

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*In re*  
 FITZGER-  
 ALD'S  
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 —  
*Argument.*

As to the supplemental affidavit, there is no reason why it should not be made after the death of the conusor.—[The LORD CHANCELLOR. I certainly see none.]

Mr. *Brewster* and Mr. *Shekleton*, in suport of the order of the Landed Estates Court.

This affidavit does not *verify* the usual or last known place of abode. When the Act specifies that the "usual or last known place of abode" of the defendant must be mentioned, it does not mean the place of abode at the time of entering the judgment. Test the sufficiency of this affidavit by the question—could the person who made it be indicted for perjury, if it were proved he had never lived at the place of abode mentioned in the margin? He could not, for he does not pretend to swear to any such fact. This Court held, in *Re Fitzgerald* (a), that the requisites of this statute must be strictly complied with. *M'Dowell v. Wheatley* (b) is an authority against the validity of this affidavit. In *Crosbie v. Murphy* (c) the affidavit was held defective, because the conusor was described as "widow."—[The LORD CHANCELLOR. In that case it was proved that the widow had a trade.]—The margin is not covered by the oath. The statute meant that there should be the security of the oath of the party making the affidavit, as to his last known place of abode. Suppose Mr. Fitzgerald had lived, from the time of his birth until the entry of the judgment, at the place named, and a week afterwards had left it, that being twenty years ago, would not the affidavit, in that case, be true, and yet in direct opposition to the Act of Parliament?—[The LORD CHANCELLOR. The defendant in this cause is stated in the margin to be "Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq." If those words be substituted for the words "against the defendant in this cause," in the body of the affidavit, it will then run "against Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq.," which would be a complete compliance with the statute.]—The

(a) *Ante*, p. 278.

(b) 7 Ir. Com. Law Rep. 562.

(c) 8 Ir. Com. Law Rep. 301.

statement of the title of the cause in the margin is not upon oath; and, moreover, it is merely the title of the cause at the time the judgment was entered.

They also cited *Fonblanque v. Lee* (a); *Pickard v. Bretz* (b).

Mr. *Ryan*, in reply, cited *Hewer v. Cox* (c).

THE LORD CHANCELLOR.

We are of opinion that the first affidavit in this cause may be held good, without encountering any decision hitherto made upon the construction of the Act of Parliament, and without violence to the words of the statute, to common sense, or to reason. The Act requires the affidavit to state certain things; among others, the names, the usual or last known place of abode, and the title, trade or profession of the plaintiff and of the defendant. Now it is said that this affidavit, although complete in all other respects, is defective in this particular—that it does not state the title and last known place of abode of the defendant. It states that the judgment in question was recovered “against the defendant in this cause.” The defendant in the cause is stated in the margin to be “Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Westmeath, Esq.” That, no doubt, is his description as it stood at the time of entering up the judgment; but the party, when registering that judgment as a mortgage, says, in effect, “I recovered a judgment against the defendant in this cause, and he is that very man.” Had there been a change in his residence, and had the affidavit stated that the judgment had been recovered against Thomas Joseph Fitzgerald, of some other place, by the name of Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq., that would mean “I recovered a judgment against a man who now is of such a place; though at the time of entering my judgment, he lived at Ballinaparka, in the county of Waterford.” Is the construction of the affidavit to be altered because the man has not changed his place of abode,

1861.  
Ch. Appeal.  
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Argument.

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(a) 7 Ir. Com. Law. Rep. 550.

(b) 5 Exch., N. S., 9.

(c) 30 L. J., N. S., Q. B., 73.



1861.  
*Ch. Appeal.*  
*In re*  
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*Judgment.*

but resides at the same place as he did at the time of entering the judgment? The statement, as it stands in this affidavit, amounts to an averment that the man against whose lands the judgment is sought to be entered is Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq., and that he was so at the time when the judgment was entered.

I think the original affidavit in this case perfectly sufficient; and, therefore, I need not go into any consideration of the supplemental affidavit. I see nothing in the Act of Parliament to prevent the supplemental affidavit being filed after the death of the conusor; but that question is not now before us. I think the original affidavit quite sufficient. The judgment of Judge Lynch, in *Re Smith and Ross*, which has not been appealed from, and in which I quite concur, is a sound exposition of the law on the subject, and it is to the same effect.

THE LORD JUSTICE OF APPEAL.

I am quite of the same opinion; and, if it were necessary, I am quite prepared to say that there is nothing to prevent the supplemental affidavit being filed after the death of the conusor.

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1861.  
L. E. Court.

**Landed Estates Court.**

In the Matter of the Estate of  
**CHRISTOPHER PLUNKETT, Owner ;**  
**JOHN DOONER, Petitioner.**

Jan. 31.

THIS case arose from an incorrect description having been appended to the name of a devisee in the will of Francis Macnamara, which was duly made and published in the year 1820. The testator had, at that time, and at the time of his death, which occurred in July 1822, a daughter named Maria Faulkner, and two grand-daughters, Maria Faulkner and Catherine Faulkner. He was far advanced in life ; but no proof of mental incapacity given. The will, as far as it is material to the present case, was couched in the following terms :—  
“ I bequeath to my dearly beloved daughter Maria Faulkner all my estate, and all my personal property, in as large a manner as I do or may enjoy the same at my decease, during her natural life ; and, after her decease, I leave and bequeath unto my grandson Francis Macnamara Faulkner and to his sister Maria Faulkner my grand-daughter share and share alike, said Maria Faulkner now living in France with her uncle Martin, all my estates in the town of Ennis or elsewhere ; and, in case my said grand-daughter shall die before she arrives at the age of twenty-one years, or else married with the consent of her guardians, then I bequeath her share to my grandson,” &c. Under these circumstances, Catherine Faulkner, by way of objection to the allocation schedule, claimed a moiety of the estates devised to Francis Macnamara Faulkner and Maria Faulkner, on the ground that, notwithstanding the use of the name “ Maria,” she Catherine must have been the person intended by the testator, since the description was applicable to her, but not to Maria.

A, by his will, leaves to F. M. F., and to “ his sister, M. F., my grand-daughter, share and share alike, said M. F. now living in France with her uncle M.,” all his estates. M. F. was not then living, and had never lived, while her sister, C. F., was living, and had lived, for some time, with the said uncle M.—  
*Held*, that extrinsic evidence was admissible to explain the ambiguity in the will.

*Held also*, that there was not such a perfect balance of probabilities as to suspend the action of the Court.

*Held also*, that the name should control the description, and that M. F. was, therefore, entitled.

*Statement.*

It appeared from the affidavits of Maria Faulkner (now Maria  
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Papeira) and Catherine Faulkner (now, Catherine Plunkett) that Catherine had gone to reside, in 1817, with her uncle William Martin, in France, and had stayed with him until 1822. That Maria had never resided in France; but the preponderance of testimony went to show that she did not reside with the testator; that she had lived at various times in Malta, England, Wales and Ireland, and that, at the time of making the will, she was most probably resident in Carlow with her uncle Henry Faulkner. The testator, at the time of making his will, was seventy-one years of age; and it was sworn that, soon after that time, he became incapable of managing his affairs. These were the only material facts in the case.

Mr. *M. B. Smith*, for the petitioner.

Mr. *S. B. Millar* and Mr. *Trevor*, for the objector, Catherine Plunkett.

Mr. *J. E. Walsh* and Mr. *J. H. Orpin*, for Maria Papeira.

*Argument.*

On the question of admission of extrinsic evidence the following cases were cited:—*Delmare v. Robello* (a); *Holmes v. Custance* (b); *Stringer v. Gardiner* (c). On the question whether the name or the description should be treated as determining the object of the gift, the following cases were cited, among others:—*Newbolt v. Pryce* (d); *Doe d. Gains v. Rouse* (e); *Standen v. Standen* (f); *Smith v. Campbell* (g); *Stockdale v. Bushby* (h); *Bernasconi v. Atkinson* (i); *Smith v. Coney* (k); *Bradshaw v. Bradshaw* (l); *Bennett v. Marshall* (m); *Camoy's v. Blundell* (n); *Feltham's Trusts* (o); *Beaumont v. Fell* (p); other cases collected in *Jarman on Wills*, vol. 1, p. 313, and 2 *Taylor on Evidence*, p. 974.

(a) 3 Bro. C. C. 446.

(b) 12 Ves. 279.

(c) 27 Beav. 35.

(d) 14 Sim. 354.

(e) 5 C. B., O. S., 422.

(f) 2 Ves. jun. 589.

(g) 19 Ves. jun. 400.

(h) 19 Ves. jun. 381.

(i) 10 Hare, 345.

(k) 6 Ves. jun. 41.

(l) 2 Y. & C., Exch., 72.

(m) 2 K. & J. 740.

(n) 1 H. of L. Cas. 786, 791.

(o) 1 K. & J. 528.

(p) 2 P. Wms. 141.

DOBBS, J.

The question in this case arises on the construction of the will of Francis Macnamara, which bears date the 22nd of August 1820. No doubt arises on the will, taken *per se*; but the doubt arises from extrinsic evidence, from which it appears that the testator had two grand-daughters, one, Maria Faulkner, who was not living in France, and another, Catherine Faulkner; and she was, at the date of the will, living with her uncle Martin in France. The first question is with regard to the admission of parol evidence. The rule of law is settled that, where there is no ambiguity on the face of the will, but the ambiguity is shown by extrinsic evidence, then parol evidence will be admitted to explain the will. There is another principle, which is this, that the Court, in construing a will, will receive any evidence which places it in the same situation, as to a knowledge of facts, which the testator was in at the time he made the will. It is quite clear, therefore, that parol evidence may be received in this case, to show that Maria Faulkner was not living with her uncle Martin in France. The parol evidence shortly amounts to this; the testator was upwards of seventy years of age, and lived at Castletown, in the county of Clare; he had two grand-daughters—one, Maria, and the other, Catherine. There is not very much evidence with regard to the facts connected with their residence at the time (it is upwards of forty years ago); but it appears clear from that evidence that Catherine Faulkner was residing at that time in France with her uncle Martin; while, at the same time, it appears that Maria Faulkner was not residing with the testator, as it was alleged, but that she had been travelling about with another uncle, and that the testator resided at Castletown, in the county of Clare; but that there was another place of the same name in Carlow, where Maria resided at the date of the will. That is the only material evidence, as it appears. There is one thing which would be very material in the construction of the will; and that is, if it could be shown that Maria Faulkner was of age at the date of the will. There is, however, no evidence of that; and indeed it is quite clear that she was under age at the time of the will. If she had been of age, and Catherine had not,

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*Judgment.*

then the limitation over in case of her dying under age would have been applicable to Catherine only, and not to Maria. That would have made all the difference in the construction of this will. Then the question is, whether the testator, having bequeathed the property to "Maria Faulkner, living with her uncle Martin in France," the name "Maria" is to prevail over the description, "living with her uncle Martin in France," according to *Lord Bacon's* maxim, *veritas nominis tollit errorem demonstrationis*? and, secondly, whether the bequest is void for uncertainty?

There was some reason to contend that it was void for uncertainty; but there are two cases which show plainly that the principle of law is, that if it is possible to give a reasonable construction to the words of the bequest, it is not to be held void for uncertainty; and this case comes within the principle of those cases. The first of these cases is *Adams v. Jones* (a). In that case the question was, whether, under this bequest, "I give to Clare Hannah Adams, the wife of Thomas Adams, of Walworth aforesaid, writing-clerk, the sum of nineteen guineas," *the wife* of Thomas Adams, whose name was Hannah, or his daughter, whose name was Clare Hannah (and who, at the date of the will, was an infant two years old), was intended, or whether the gift was void for uncertainty? In that case the Vice-Chancellor Turner observed—"A disposition cannot be avoided for uncertainty, if the Court can arrive at a reasonable degree of certainty. In this case, I think the party to be benefited is reasonably certain." The same was laid down in *Bernasconi v. Atkinson* (b), where the Vice-Chancellor observed—"If it were *res integra* we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*, and *Bradshaw v. Bradshaw*, are against this conclusion." These cases show that, if it is possible for the Court to come to a reasonable conclusion, the bequest will not be held to be void for uncertainty. Taking it then that, in this case, a reasonable conclusion can be arrived at, the next question is, whether the name or the description is to prevail?

A number of cases have been cited, which, in point of fact, are not applicable exactly to the present case; for this reason, that they

(a) 9 Hare, 486.

(b) 10 Hare, 350.

were cases in which there was no person of the name used by the testator. The name used was not the correct name of any person. I do not think, therefore, that those cases are applicable, with the exception of one, *Lord Camoys v. Blundell* (a), and in which the principles of construction, in such cases, are laid down in the opinions of the Judges. At p. 786, Baron Parke says, "It may be conceded that where a devisee is described by his Christian and surname, and some other distinctive circumstance, and no person answers both descriptions, and there is nothing in the rest of the will, or the admitted evidence, to show who was meant, the name would prevail, and the descriptive circumstance would be rejected. But the maxim *veritas nominis tollit errorem demonstrationis* is not inflexible, as has been explained by Lord, Chief Justice Gibbs, in the case of *Doe v. Huthwaite*. For, if it be clear, upon the due construction of the will, with reference to the evidence of the state of the family as known to the testator, that the meaning of the testator, as expressed by the will, was, that the person described, and not the person named, was to take, the description will prevail over the name; for the rule in question has no other object than to assist in discovering the meaning of the will, and is not applicable where it leads to a construction contrary to the expressed meaning of the testator."

Nothing can be clearer than the principle laid down by Baron Parke in that case. The question then which I have to decide is, whether I can come to a reasonable conclusion that Maria Faulkner was the object of the testator's bounty, or that he meant Catherine Faulkner? I have come to the conclusion that, in this case, the testator meant Maria Faulkner, his grand-daughter, and that the principle "*veritas nominis tollit errorem demonstrationis*" must apply, and that the further description of "now living with her uncle Martin in France" was a misdescription, and should be rejected. Maria Faulkner is, therefore, entitled to a moiety of the fund in Court.

It is a remarkable thing in this will, that the testator does not appear to have mistaken the Christian-name of anybody. In almost

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(a) 1 H. of Lords Cases, 778.

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all the cases the Christian-name of some one was mistaken, but here there was no mistake whatever. In the *gift* he does not describe Maria Faulkner as living in France. Her name in the phrase giving the gift is not embarrassed with any description. It is not till after the gift (which is complete in itself) that the description comes as if in a parenthesis, thus—"I leave and bequeath unto my grandson Francis Macnamara Faulkner and to his sister Maria Faulkner my grand-daughter share and share alike (said Maria Faulkner now living in France with her uncle Martin), all my estates," &c. It is not the bequest which shows that the person who was the object of his bounty was living in France with her uncle Martin. The gift is a distinct gift to Maria Faulkner, and the place of her residence merely pointed out incidentally. I can very well imagine that an old gentleman having two grand-daughters, neither of whom lived with him, would more easily and naturally mistake the description than the Christian-name. He first gives a life estate in the whole to his *daughter* Maria Faulkner. That was the same name as his grand-daughter Maria, and makes it less likely that he should have made a mistake in the name. Putting all these things together, I have come to the conclusion that the name is correct, and the description is to be thrown over.

There is in *Kay & J.*, p. 528, a case (*In re Feltham's Trusts*) which has been referred to, and which appears to be a very strong case in favour of the opposite view to that which I have taken. In that case there was a bequest of £100 to Thomas Turner, of Regency-square, Brighton. The testatrix had two nephews, the said Thomas Turner, who did not live in Regency-square, and James Turner, who did live there. Extrinsic evidence was admitted, and a prior will was produced, made three years before, in which the testatrix had given a legacy to Thomas Turner, of Regency-square, Brighton, *surgeon*. James Turner was a surgeon; and this fact was held to be conclusive evidence in his favour, as it had not been shown that the testatrix had discovered her mistake as to the name, before she made her last will. Now there was in that case one element which is not to be found in this, and which appears to have been the chief reason of the decision, namely, that the lady

had made a prior will, and had there described the intended object of her bounty as a surgeon, which was not the profession of the person named. In that case the Court, in order to have given effect to the name, must have disregarded, not a misdescription in point of residence merely, but two misdescriptions, one in point of residence, and one in point of profession. This makes a broad distinction between the present case and that of *Feltham's Trusts*.

In the case of *Newbolt v. Pryce* (a), there was a bequest to John Newbolt, second son of William Stranways Newbolt, Vicar of Somerton. The Vicar of Somerton was William Robert Newbolt. His second son was Henry Robert, and his third son John Pryce. It was held that John Pryce Newbolt was entitled to the legacy. The Vice-Chancellor thought there was sufficient "*veritas nominis*" to take away the "*errorem descriptionis*."

Upon all these grounds, I think the object of this gift is Maria Papeira.

(a) 14 Sim. 354.

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*Judgment.*

In the Matter of the Estate of  
JOHN K. EDWARDS, *Owner*;  
Ex parte ANNA MARIA DOWLING, *Petitioner*.

THE question in this case was raised on a motion by the petitioner, to make the conditional order for sale, previously granted by the Court, absolute. Cause was shown against making the order absolute, by P. W. Jackson, a mortgagee on the estate. Jackson grounded his opposition on his deed of mortgage, dated the 3rd of May 1859. This deed contained a proviso that Jackson would not call in the sum secured (£2500) until two years had elapsed, or twelve months' interest had accrued due; and "that in case one full year's interest

gagement entered into at the time of

June 12.  
A mortgagor, by a proviso in a mortgage deed, agrees in a certain event to sell to B, the mortgagee, for a fixed sum, part of mortgaged premises.—*Held*, that the proviso was totally void, as being an onerous en-  
the mortgage.



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*Statement.*

on said principal sum of £2500 shall become due and be unpaid at any time during the said period of two years, or in case the John K. Edwards shall, at the expiration of the said period of two years, be unable to redeem the mortgaged premises, it shall and may be lawful for the said Peter W. Jackson, his executors, administrators or assigns, if he or they should so elect or prefer, to purchase for his or their own use and benefit; and the said J. K. Edwards doth hereby for himself, his heirs and assigns, promise and agree to sell and absolutely convey, by all necessary deeds and assurances in the law, to the said P. W. Jackson, his heirs and assigns," the part of the mortgaged premises called Old Court, for such sum as, with the sum of £2500, and interest then due thereon, would make £4000. Jackson now, relying on this agreement, contended that Edwards was bound to complete the conveyance of Old Court to him.

*Argument.*

Mr. *R. R. Warren* (with him Mr. *Wm. Woodroffe*) appeared for the owner and the petitioner.

Mr. *Brereton* appeared for the objector, P. W. Jackson.

Mr. *Warren*.—The cause alleged is a proviso or condition of forfeiture of the mortgagor's equity of redemption, contained in the deed of mortgage itself. This condition is void, for it is inconsistent with the doctrine "once a mortgage always a mortgage." The very terms of the proviso are that, in default of redemption in two years, the right to redeem should be lost for ever, and the mortgagor obliged to sell to the mortgagee out-and-out. Even if the condition were good in law, it is gone; for it is not shown that the mortgagor was unable to redeem on the day named; and on that day the mortgagee should have elected to take advantage of the condition. The case is like a condition of re-entry at Common Law for non-payment of rent, when demand must be strictly made.

Reference was made to the cases collected at s. 1019 of *Story's Eq. Jur.*, and *Coots on Mortgages*, p. 14; *Cruise's Dig.*, tit. *Mortgage*, p. 71, 4th ed.; *Jennings v. Ward* (a); *Willet v. Winnell* (b).

(a) 2 Vern. 520.

(b) 1 Vern. 488.

HARGREAVE, J.

I have no doubt that this agreement on the part of Mr. Edwards, to sell the Old Court estate for £4000, in the event of his not being able to redeem the mortgage on the 4th of December 1860, is totally void, and ought to be disregarded by a Court of Equity.

The rule of Equity is, that no onerous engagement of any description can be entered into by a mortgagor with his mortgagee on the occasion of the mortgage. I do not doubt that if this contract had been entered into by Mr. Edwards with Mr. Jackson, after the completion of the mortgage transaction, and when Mr. Edwards had got the money in his pocket, it would be perfectly valid; but then the mortgagor would be under no kind of pressure, and he would be able to exercise his unbiassed judgment, as to whether it was a fair contract. But when the contract is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced.

If the land had fallen in value below £4000, Mr. Jackson would have insisted on being treated as a mortgagee; but, as it has risen, he says he is a purchaser: that is, he gets a collateral benefit over and above his principal and interest, which a Court of Equity never permits.

This contract is virtually a clause of foreclosure on a fixed day; and even in England, where foreclosure is possible, it only takes place after a bill has been filed for the purpose, and after the mortgagor has had one or more days fixed for paying the debt.

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ESTATE.  
*June 14.*  
*Judgment.*

In the Matter of the Estate of  
The Assignees of WILLIAM RODDY, *Owners*;  
Ex parte FRANCIS FITZGERALD, *Petitioner*.

June 17.

THE question in this case arose on the ruling of the final schedule. The facts appear in detail in the judgment.

A mortgages Blackacre to B, and gives him as a

collateral security a judgment which attaches on both Blackacre and White-  
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Argument.

Mr. *Frederick Smith* appeared for the petitioner.

Mr. *Robert Owen*, for the mortgagee, Robert Clifford.

Mr. *David Sherlock* and Mr. *John M'Mahon*, for the judgment creditor, Martha Fitzgerald.

Reference was made to *Hartley v. O'Flaherty* (a); *Averall v. Wade* (b); *Handcock v. Handcock* (c).

DOBBS, J.

June 24.  
Judgment.

William Roddy, the late owner of two several freehold estates which have been sold in this matter, and which, in the course of the argument of the question now before the Court, have been called respectively the mortgaged and the unmortgaged lands, was indebted, by judgment of Hilary Term 1834, to Martha Fitzgerald; but the said judgment, not having been either re-docketed or re-registered until the 23rd of July 1855, has been placed upon the schedule of incumbrances, after the several charges on the lands prior to the latter date. As the consequence is that the funds in this Court, representing all the lands sold, both mortgaged and unmortgaged, without separating the amount produced by the sale of the former from that produced by the sale of the latter, will not be sufficient to pay Martha Fitzgerald's judgment debt in the priority in which it now stands, she has by an objection raised the point now to be decided. It is this:—William Roddy, by deed dated the 4th of September 1833, mortgaged the lands which have been called the mortgaged lands, to Henry Fulton, to secure £1500, and gave the then usual judgment collateral to secure the said sum; this judgment is of Easter Term 1834, but, having been first re-registered, takes priority of that of Hilary Term 1834. By indenture of the

(a) Ll. & G., *temp. Plunk.*, 206. (b) Ll. & G., *temp. Sug.*, 252.

(c) 1 Ir. Chan. Rep. 444.

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acre. Subsequently B assigns his debt and securities to C, and A at the same time mortgages Blackacre to C for a further sum, with a covenant against all incumbrances except the mortgage to B.—*Held*, that C, as against a *puisne* incumbrancer, is entitled to be paid the debt assigned to him by B out of Whiteacre first, so as to leave Blackacre unimpaired to meet the second mortgage made to C himself.

21st of October 1842, and made between Henry Fulton of the first part, William Roddy of the second part, and Robert Clifford of the third part, the mortgage of the 4th of September 1833 is assigned to Robert Clifford, and, by the same deed, William Roddy gives a further mortgage of the same lands to Robert Clifford, to secure advances to be made by him to Wm. Roddy, to the amount of £500; and by indenture of the same date, the judgment of Easter Term 1834 is assigned in the common form by Henry Fulton to Robert Clifford. Now Martha Fitzgerald contends that Robert Clifford must be paid the whole sum due on account of the mortgage of 1833, out of the produce of the sale of the mortgaged lands *alone*, and that the residue thereof is the only fund applicable to the payment of the subsequent mortgage of 1842, for £500 additional. The representative of Robert Clifford contends that he is, by virtue of his judgment collateral, entitled to be paid what is due in respect thereof out of the unmortgaged lands, or at least rateably out of them and the mortgaged lands, so as to leave the produce of the mortgaged lands or the residue to pay what is due on account of the second mortgage of 1842.

The deed of assignment and further mortgage of 1842 recites the mortgage of 1833, and contains a covenant by Wm. Roddy, that the principal sum of £1500 thereby secured is due, and that the lands are free from all incumbrances except the said recited mortgage; and also a covenant by Wm. Roddy for quiet enjoyment, and the common form of covenant for further assurance by Wm. Roddy and Henry Fulton. I do not see that the judgment, being one collateral with the mortgage of 1833, instead of being an independent security, can make any difference; as, if so, the effect would be to make Robert Clifford worse off, by being entitled to the mortgage as well as the judgment of 1833, than he would have been if he had had the judgment only.

If the deed of 1842 contained no covenant against incumbrances, the only distinction between this case and that of *Handcock v. Handcock* (a) would be, that the same person is entitled here to both securities; for if Henry Fulton had retained the mortgage

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*Judgment.*

and judgment of 1833, and there was no covenant against incumbrances, this case would not have been distinguishable in principle from that case, and Robert Clifford would have thrown Fulton's mortgage on the unmortgaged lands, leaving the mortgaged lands free for his (Clifford's) mortgage, on the authority of *Averall v. Wade* (a), as extended by *Handcock v. Handcock* to cases where there is no covenant against incumbrances, but where there is a covenant, as here, for quiet enjoyment.

The question then comes to this—does the exception of the mortgage of 1833 from the covenant against incumbrances make the difference, inasmuch as, by the terms of the deed of 1842, the security taken by Robert Clifford for his £500 advanced is only what remains of the mortgaged lands after payment of the mortgage of 1833? and if it does not, does the fact that Robert Clifford, the same person, is owner of both mortgages and of the judgment collateral with the first, make any difference? I cannot see that the exception makes any difference, for the words are in the affirmative, that the lands are free from all incumbrances except the prior mortgage; and it would place a restriction, for which I know of no precedent, on the meaning of those words, to hold that they were to confine the security of the second mortgage to the value of the lands, after deducting in every event the whole sum secured by the first mortgage. Although the lands are by the covenant subject to the first mortgage, it could hardly be contended that, therefore, the second mortgagee was not to have the benefit of any payment on account of the first mortgage out of the personal estate of the mortgagor; and if so, should he not have the benefit of any equity that would arise *aliunde*, to relieve the lands in whole or in part from the first mortgage?

I think, therefore, that notwithstanding the wording of the covenant against incumbrances, the second mortgagee can throw the first mortgagee, as being also a judgment creditor, on the unmortgaged lands.

The circumstance of R. Clifford being himself entitled to both

(a) L. & G., *temp. Sug.*, 252.

securities appears to me to make the case more favourable to his right to throw the first mortgage on the unmortgaged lands, than if he had not been entitled to the first mortgage and judgment. For he could, by virtue of his judgment, have proceeded to recover the whole amount due out of the unmortgaged lands; and if he had done so, the case of *Hartley v. O'Flaherty* (a) shows that, in such an event, the parties having subsequent charges affecting the unmortgaged lands would have no equity to be recouped out of the mortgaged lands.

For these reasons, I think the representative of R. Clifford entitled to be paid the sum due on account of the mortgage and judgment of 1833, at the very least rateably out of the mortgaged and unmortgaged lands, which will leave enough of the proceeds of the mortgaged lands to pay the sum due on the mortgage of 1842; and, therefore, that the rulings and orders for payment already made on the schedule are to remain unaltered.

Objection overruled accordingly, with costs.

(a) L. & G., *temp.* Plunk., 208.

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*L. E. Court.*  
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ESTATE.  
*Judgment.*

1860.  
Ch. Appeal.

Court of Appeal in Chancery.

DODDS v. DODDS.\*

Nov. 27.

Bequest of portion of a chattel real "to my son J., and if J. dies without a lawful male heir, his part of the land falls to his brother R. I also order that the part of the lands which I bequeath to my son J. is to fall to his youngest son, without any incumbrance."  
—*Held*, that J. did not take an absolute interest in his portion of the lands, and that the gift over to R. was not too remote.

Statement.

THIS case came before the Court upon an appeal from an order of the LORD CHANCELLOR, dated the 4th day of June 1860, by which he gave relief to the petitioner, under the following circumstances:—

By lease, dated the 30th of October 1799, lands were demised for a term of twenty years, with a *toties quoties* covenant for renewal.

The lessee's interest became vested in George Dodds, who, in 1842, obtained a renewal for twenty years. In 1847, George Dodds made his will, which, so far as material, was as follows:—"I leave

and bequeath to my son Robert that part of land that Felix Conly lived in, which I hold by a *toties quoties* covenant of renewal. I also order, that if my son Robert takes a notion to sell

that part of land which I bequeath to him, that I will not permit him to sell to anyone but his brother John. I also order, that if my son Robert dies without a lawful male heir, his part of lands falls

to his brother John. I also order, that the part of land which I bequeath to my son Robert is to fall to his youngest son, without

any incumbrance. I also leave and bequeath to my son John that part of land which I lived in at the time Conly had the other part;

I also order, that if my son John takes a notion to sell that part of land which I bequeath to him, that I will not permit him to sell to anyone but his brother Robert. I also order, that if my son John dies without a lawful male heir, his part of the land falls to his

brother Robert. I also order, that the part of lands which I bequeath to my son John is to fall to his youngest son, without any incumbrance." These lands were the lands comprised in the lease

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\* *Coram* The LORD CHANCELLOR, LORD JUSTICE OF APPEAL and MR. JUSTICE BALL.

of 1799, and the renewal of 1842. In 1849, the testator died, leaving his said two sons, Robert Dodds the petitioner, and John Dodds. The petitioner having emigrated to America, John Dodds obtained a fee-farm grant of the lands comprised in the lease of 1799, under the provisions of the Trinity College, Dublin, Leasing and Perpetuity Act. In 1859, John Dodds died intestate and without male issue, leaving one child only, a daughter, who was named as a respondent to the petition, and never having had a son.

The petition in this suit was filed in 1860, stating the above facts, praying that Robert Dodds should be declared entitled to the said lands, and for a conveyance, and an account of the rents and profits. The respondents alleged a sale of the petitioner's interest to John Dodds, and relied on the construction of the will, as giving an absolute interest to John Dodds; but the petitioner, by his affidavit in reply, denied the sale to him, and relied on the Statute of Frauds.

The account of rents and profits was waived at the Bar.

[See this case reported in the Court below, vol. 10, p. 476].

Mr. C. Andrews and Mr. Kay, for the appellant.

Mr. Serjeant Lawson and Mr. Arthur Jackson, contra.

*Wynch's Trusts* (a); *Gummos v. Howes* (b); *Doe d. Burren v. Charlton* (c); *Knight v. Ellis* (d); *Doe v. Laming* (e); *Goodlittle d. Peake v. Pegden* (f); *Fearne Con. Rem.*, p. 154. *Britton v. Twig* (g); *Per. Prof. Book*, p. 132; *Idle v. Cooke* (h); *Jesson v. Wright* (i).

THE LORD CHANCELLOR.

When this case came before me in the Court below, I came to the conclusion that the testator had, by his subsequent language,

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*Statement.*

*Argument.*

*Judgment.*

(a) 5 De G., M. & G. 188.

(c) 1 Scott, N. S., 290.

(e) 2 Burr. 1100.

(g) 3 Mer. 176.

(b) 23 Beav. 184.

(d) 2 B. C. C. 570.

(f) 2 T. R. 720.

(h) 2 Lord Ray. 1152.

(i) 2 Bl. 1.



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explained what he meant by the words "male heir." I thought that there was evidence to show his intention to change the course of devolution from the direction which it would have taken if the property were to descend to heirs of the body, or heirs male of the body, which would have required an estate tail, and would have given an absolute interest in personalty. It is plain that these words, strong as they are, are capable of explanation, that they may be modified so as to show an intention to give to other persons than those who would take by descent. This distinction is established by a long class of cases, and is admitted even in *Jesson v. Wright*. These cases were referred to by Serjeant *Lawson*, and collected by Mr. *Jarman* (a); and they show conclusively that these words are capable of explanation; and that if they are used in such a way as to show that they meant not heir in a general sense, but son or child, then they must be modified, and receive the sense affixed to them by the testator. I quite agree with Mr. *Andrews*, that, in order so to modify the words, language must be used which cannot be misunderstood.

Mr. *Kay* has argued, very ingeniously, that these words only mean that when the estate descends to the youngest son, if it ever does so descend, it is to come to him without incumbrance; but I cannot help seeing that such is not their true construction, and that it is intended that the youngest son should take in remainder—an arrangement wholly inconsistent with the gift of an estate tail, and which would disturb the line of descent. Where that is the case, there are authorities to say that the effect is not to create an estate tail. Their effect is thus summed up in 2 *Jar. Wills*, p. 302:—"But it seems that if the superadded words of limitation operate to change the course of descent, they will convert the words on which they are engrafted into words of purchase, as in the case of a devise to a man for life, remainder to his heirs, and the heirs female of their bodies."

That, to some extent, illustrates the view which I took of this case in the Court below. There is the word "son," or rather, there are the words "youngest son," used in a way quite inconsistent

(a) 2 *Jar. on Wills*, 312.

with, and which excludes, the idea of an estate tail in the eldest son. On these grounds I think that, on the face of the will, there is ample evidence, which cannot be misunderstood, of the sense in which the testator used the words "heir of the body."

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*Judgment.*

THE LORD JUSTICE OF APPEAL.

I agree with the LORD CHANCELLOR, that this appeal should be dismissed, and the decree affirmed. The first clause in this will, which is the only direct disposition of the property to John Dodds, would have given him the interest, which was leasehold, absolutely; but this effect of it was liable to be controlled and varied by the subsequent words of the will; and it is so varied by the intention which is subsequently expressed, and to effectuate which his interest must be limited to an estate for life. There can be no doubt that it was competent in the testator to do so; but it was contended that this has not been effected, because the second bequest, that is, the bequest over to Richard, is, "if John die without a lawful heir male;" and it is argued that, as these are words of limitation sufficient to give John an estate tail in real property, they have such a fixed and inflexible operation as does not admit of their control by the subsequent clause or clauses of the will. From this argument I altogether dissent; it is quite at variance with authority, and would fetter the power of the testator, in a manner not to be reconciled to the law, that his intention, however collected or expressed, is to be effectuated. Have we, then, in this will an intention that the heirs male of John were not to take, as they would take if he were tenant in tail male? There is, in my opinion, in the limitation over to the youngest son of John, the most explicit evidence of the intention that all the sons were not to take in succession (as heirs of his body); but that, on his death, the youngest of his sons should take the whole interest—to the total exclusion of his elder brothers, not one of whom could, therefore, ever succeed to the property as heirs male of their father, without a violation of the plainest evidence of the intention to exclude them. Thus we have an unequivocal disposition of the property on John's death, that negatives the inference and construction that, by that, the preceding clause

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was intended to transmit the property to the heirs male of John, according to their seniority.

**Mr. JUSTICE BALL.**

I am of the same opinion as the LORD CHANCELLOR and the LORD JUSTICE OF APPEAL. It has been assumed, at the Bar, that the words used were "heirs male, or heirs male of the body." Now those words are very difficult to deal with, and are treated in all our Courts as the most embarrassing and inflexible which can be employed; but they do not occur in this will. The gift here is, if the son should die without a male heir, which is not so conclusive in its effect; and then it is clear that the words "male heir" have not been used in their proper sense, for he has directed the property to go to the youngest son, without any incumbrance. If it so devolved, it would not go to the heir male; and thus the use of this expression gives a construction to the words "heir male," and shows what the testator really means. We are bound to give to those words the construction which the testator intended them to have; and it is plain, beyond all doubt, that his meaning was, that the estate should go to the youngest son of John, in the first instance, and then, for want of a younger or any other son, that it should go over.

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*Chancery.*

DORAN v. CARROLL.

(*In Chancery.*)

Dec. 3.

THE petition in this case was filed by Mrs. Sarah Letitia Doran, by her next friend; and stated that, by an indenture of the 20th of February 1856, Edmond Doran demised, for three lives or thirty-one years, to the respondent, Thomas Carroll, the lands of Ninch, with the mansion-house and other lands, reserving timber, timber trees, woods and under-woods; with a covenant by the said respondent to maintain all timber and timber trees, and that none of the same should be cut down, lopped or injured, without the consent of the said Edmond Doran, or his heirs; and a covenant by the lessee to repair, preserve and keep all edifices, buildings, wall-fences, gates, gateways and improvements in good repair. It further stated that the said Edmond Doran died in 1857, without issue, whereupon the petitioner became entitled, for her separate use, to the reversion in the said premises expectant on the determination of the said demise, for her life, with remainder to her eldest son in tail. The petition further alleged that, in the month of January or February 1860, the respondent had broken down and removed a wall in the garden in said demised premises, which wall was sixty yards long, or thereabouts, nine feet in height, and two feet in thickness, and had fruit trees growing on each side of it. That the respondent had dug up fruit trees in the garden, and had cut down and lopped a large quantity of timber trees growing on the lands, without any consent, and cut down, injured and removed a *verbanum*\* tree, of considerable value, in the lawn, in the said demised premises, and several ornamental and fruit trees,

Where a lessee, bound by covenant not to commit waste, has committed acts of waste, for which damages merely nominal would be given, the Court of Chancery will not entertain a suit against him, founded on those acts of waste, where it appears that he does not contemplate committing any further waste, nor assert a right to commit it. No change in this respect has been introduced by the Chancery Amendment Act 1858.

A tenant, by replying to a letter charging him with the commission of waste, and requiring him to make compensation for it, "that he is prepared to defend any action which may be brought against him,

and to show that, so far from having committed injury, he has materially improved the premises demised to him," does not assert a right to commit the waste complained of.

\* *Sic.*

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including a large number of apple trees, in the said garden ; and that he had opened a gravel-pit, about nine feet long, about three feet wide, and about three inches in depth, in the said premises, on a rising ground in front of the said mansion-house ; and that it was the intention of the respondent to dig gravel from the said lands. The petition further stated that the respondent had lopped eight or nine evergreen trees, so as to deteriorate them in value.

The petition stated the above, amongst other matters, and prayed for an account of timber, timber trees, ornamental timber and fruit trees, cut down, and of the injury done by opening a gravel-pit, and breaking down walls and fences, and for an injunction against cutting timber, and throwing down walls and fences, or committing other waste, and for damages.

Prior to the filing the petition, the petitioner's solicitor had written to the respondent the following letter :—"I am directed by Mr. and Mrs. O'Ferrall Doran to take the most summary proceedings against you, under the covenant in your lease, for the cutting large quantities of timber, breaking down and destroying valuable stone walls, and otherwise injuring the premises demised by the lease. The penalties and consequences, as to what you have done as to the cutting of the trees, are very serious ; and I require you to inform me, on or before Friday next, whether you will pay the penalties already incurred under your lease, and stop any further damage to the trees. I beg likewise to inform you that my clients have sustained heavy damage, by reason of your throwing down and removing the walls ; and I require you to inform me, by the above day, whether you are prepared to pay such damages, or have the walls re-constructed."

In answer to this, the respondent's solicitor wrote :—"Mr. Carroll has forwarded to me your letter, with instructions to reply to it, and to appear for him. I will not put you to the trouble of serving him with a summons and plaint ; but, if you will be good enough to furnish me with a copy, I shall appear for Mr. Carroll in the usual way, and am quite prepared to defend any action which you may be instructed to bring against him, and to show that, so far from having committed the injuries you have mentioned, he has materially

improved the premises demised to him. The lease in question was prepared by me; and I happen to know all that subsequently passed between the parties to it, and am quite prepared to meet the claims set up by Mr. and Mrs. O'Ferrall. Mr. Carroll informs me that your clients asked him to go to stay at Ninch for a few days, which he allowed them to do; and that the return which he gets for his civility is a threatened action, the materials for which appear to have been collected while on a visit in his house. I shall make no comment on this, but leave it to be judged by a jury."

Shortly after these letters (which were put in issue), the petition was filed; and to it Mr. Carroll put in an answering affidavit, by which he stated that, when he took the lease of the lands of Ninch, the house was out of repair, and the lands in an exhausted condition. That he top-dressed and drained portions of the lands, and repaired and improved the house, and had expended in such repairs and improvements about £1000. He further alleged that Edmond Doran had given his permission to cut down certain trees, for use on the premises; but Doran denied that, since the petitioner came into possession of the premises, he had cut or lopped a single tree on the premises. He admitted that he had taken down a wall in the garden, alleging that it had been injurious to the garden, and applied the materials of it in raising another garden-wall, to keep off the east wind, and that the trees which had been trained on it had a better prospect of bearing fruit than they had before. He further alleged that, on an occasion when the removal of the wall had been pointed out to the petitioner, her husband, who was present, said that it was a great improvement. He further alleged that he had deposited the stones of the wall, which were unfit for building purposes, in a waste spot of the lands, and that he never intended to remove the stones off the lands, but did intend to apply them for drainage and other purposes on the lands. The respondent further averred that he never cut, injured, lopped or uprooted a single evergreen, tree or shrub on the premises; but that his gardener grafted some good apples on some crab-trees through the plantations, and that two holly-trees were carried away by the

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petitioner herself; and he denied making any gravel-pit, and that it was his intention to commit further acts of waste.

Mr. Serjeant *Sullivan*, Mr. *David Sherlock* and Mr. *Curtis*, for the petitioner.

Even on the respondent's admission here, waste has been committed; and, under the present law of the Court, it has jurisdiction to award damages in that case, even if the respondent have no intention of committing further acts of waste. But in his solicitor's letter to the petitioner he justifies his conduct, and asserts that he can defend it. That brings the case clearly within *Tipping v. Ackersley* (a) and *Johnston v. Hall* (b).

Mr. *Brewster*, Mr. *Hugh Law* and Mr. *J. F. Townsend*, contra.

The respondent, upon the evidence, is plainly an improving tenant, and does not intend to commit any further acts even of technical waste. The amount of damage actually done by the waste established in this case is so small that it comes within the principle of *Lambert v. Lambert* (c), as being below the dignity of the Court. The Chancery Amendment Act 1858 does not confer any new jurisdiction upon the Court; it merely gives an additional remedy, by assessing damages in cases where the jurisdiction by injunction attaches. In *Tipping v. Ackersley*, the defendant contended that he had a right to continue the acts of which complaint was made, while the respondent here disclaims all intention of committing any further act even of technical waste. His letter does not allege a right to do anything injurious to the reversion.

THE LORD CHANCELLOR.

Judgment.

In this case, it is quite plain that there is not any case either for an injunction or for an account. This is a suit in which the petitioner sues as reversioner expectant on the determination of a lease, made to the respondent, Thomas Carroll, by the late Mr. Edmond Doran, who, it is alleged, was tenant for life under the

(a) 2 K. & J. 264.

(b) *Ibid*, 414.

(c) 2 Ir. Eq. Rep. 210.

will of Denis Richard Doran. It has been suggested that Mr. Edward Doran had no power to authorise or consent to any act of waste, or to permit the tenant to cut down any trees. The frame of the present suit, however, is not pointed to relief on that account. It does not allege that Mr. Doran had not the power to make the lease, but, on the contrary, makes the case that the lease is binding, but the covenants broken. If the suit were constituted to impeach the lease, it would be a case for another mode of trial. Here, however, the question simply is, whether the conditions of this lease, or any of them, have been infringed by the tenant?

The first alleged breach of duty to which I shall advert is the destruction of the wall. That occurred some time ago. Undoubtedly it is an act of waste; but it has been accomplished; and it is now entirely for the consideration of a Court of Law. The wall is prostrate, and there is an end of it. It is clearly not a case in which a mandatory injunction to re-build the wall could be granted; so that, as to this, it is a simple case to go to a jury, and I believe that no jury would give substantial damages; and if the case were to go into the Master's office, I am quite sure that it would come back with a report of damages one shilling. Then, as to the trees, the respondent here does not contend that he has a right to cut down one single tree; he admits that, as to the timber, he is bound to maintain it; and, therefore, it is not in the least like *Tipping v. Ackersley (a)*, where it was insisted by the plaintiff that one construction ought to be given to the instrument, and by the defendant that its true meaning was quite different. The suit in fact was founded on a question with respect to the extent of the contract, the defendant claiming a right to do the things to which the plaintiff objected. Here, however, that is not the case. The respondent admits the whole instrument; he admits that he is bound not to do any waste, and he proves that this was his case, by showing the consent, be it good or bad, which he had obtained from Edmond Doran in his lifetime, and from the petitioner afterwards; and he shows that he stopped when her consent was revoked. Under all these circumstances, if I were to send the case into the office, I

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(a) 2 K. & J. 264.



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think it would not produce any beneficial result to the petitioner. The respondent swears that there has not been a tree cut down since the petitioner wrote to withdraw her permission. Possibly a case might have been made in another aspect; but the petition is not framed for relief against the representatives of the prior tenant for life; and an account in it could give nothing. The evidence here clearly satisfies me that the respondent has not the least intention to cut down any further trees, or pull down any other wall. I have evidence of some small damage, for which, perhaps, a jury would give one shilling damages; and, if the petitioner wish, she can try her hand in an action, or a civil-bill; but this suit I consider most vexatious; and I will, accordingly, dismiss the petition with costs.

*Reg. Lib., 26, f. 336.*

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*Bankcy., &c.*

**Court of Bankruptcy and Insolvency.\***

In re JOHN ROBINSON, a Bankrupt.

Nov. 9, 10.

THIS case came before the Court on a special case stated by consent. The facts of that case, so far as they are material to the points decided, are set forth fully in the judgment of the learned Judge.

Mr. *H. H. Joy* and Mr. *James Kernan*, for the assignees.

This case must be decided with reference to the laws of this country: *Hunter v. Potts* (a); *Smith v. Buchanan* (b); *Potter v. Browne* (c); *Alison v. Furnival* (d); *Story, Conflict of Laws*, s. 331, citing *Probyn v. Browne*; and same book, pp. 90, 91, 94 (ed. of 1856); *Selkrig v. Davis* (e). Personal property has no locality: *Story, Conflict of Laws*, ss. 410, 423, note f.

Mr. *D. C. Heron* and Mr. *G. May*, for the Northern Banking Company (the claimants).

The judgment of the Court in America, by which these goods were declared to be the property of the Northern Banking Company, is not impeached on the ground of fraud. It was regularly obtained in a suit in which the assignees appeared. I do not press the effect of this judgment in America more strongly against the assignees than as a nonsuit; but the whole proceeding shows what was the proper course for them to take. It has never been held that a judgment properly obtained in another country can be treated by the Courts here as mere waste paper. The proposition

The adjudication in Ireland, by the operation of section 267, vests the property of the bankrupt, situate in a foreign State, in the assignees, so far as the law of this country is concerned.

The law of New York recognises, to a certain extent, the rights of the assignees under the adjudication.

A British creditor of a bankrupt, who has, by the means of the laws of any foreign State, succeeded in obtaining possession of the goods of a bankrupt situate in that State is, in this Court, answerable for them to the assignees.

Remarks on the status of assignees in this Court, as recognised by foreign law.

Argument.

(a) 4 T. R. 182.

(b) 1 East, 6.

(c) 5 East, 123.

(d) 1 Cr., M. & R. 296.

(e) 2 Rose, 291; S. C., 2 Dow. 230, 250.

\* Coram LYNCH, J.

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that, here, by the bankruptcy all the property of the bankrupt vests in his assignees, must be taken subject to the universal rule that the right to the possession of goods can only be enforced by an action in the country where the goods are situate. *Abraham v. Plestero* (a) is a leading case on the subject. The second point ruled in this case is that, by the law of New York, the adjudication in England does not, even as between the bankrupt and the assignees, absolutely pass the property of the bankrupt situate in New York. The effect of the adjudication is merely to give the assignees a right to sue for the recovery of the property in New York.—[LYNCH, J. How can they have a right to recover the property in New York, if the adjudication does not vest it in them?—They might proceed on the statutable act of insolvency. On the common principles of international law, the effect of the adjudication must be subject to the laws of the country in which the goods are situated.—[See last case, p. 548, and the passage in 2 *Kent's Commentaries* there cited.]—If the assignees claim a right to these goods, arising out of the proceedings in the Courts here, there must be a correlative right arising out of the proceedings in the American Courts, and the judgment there must discharge the debtor; otherwise England would be the only country whose judgments are to be enforced beyond its own shores. If the assignees were now to bring an action for these goods, we should plead the judgment in America, and notice of it to the assignees. This judgment is clearly a judgment *in rem* as against the goods in America: *Hoyts v. Thompson* (b).

Mr. May, on the same side.

The proceeding in America commenced as a proceeding *inter partes*, but ended as a proceeding *in rem*; and, therefore, although personalty has no location, the goods in this case are bound by the American judgment: *Kennedy v. Casselis* (c); *Reimers v. Druce* (d); *Duchess of Kingston's case* (e), where all the authorities

(a) 3 Wendell Rep., in Supreme Court New York, 538.

(b) 1 Selden Rep. 320 (Appeal Court, N. Y.).

(c) 2 Swan. 326.

(d) 2 Sm. L. C. 593.

(e) 23 Beav. 145.

on this subject are reviewed, and *Cammell v. Sewell* (a). The assignees could not sue the Northern Banking Company, either in contract or in *tort*, for these goods: *De Medina v. Grove* (b), which shows that this case comes within the exception mentioned by Lord Kenyon, in *Hunter v. Potts* (c). On the general question, he cited *Ricardo v. Garcias* (d); *Boyse v. Colclough* (e); *Pennell v. Lloyd* (f).

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Mr. Kernan, in reply.

The question here is as to the effect of bankruptcy on a subject of this country residing here; not as to the rights of a creditor who is not a subject of this country, and who does not reside in it. The adjudication vests the property absolutely in the assignees, as against the creditors of the bankrupt in this realm: *Selkrig v. Davis* (g); *Hunter v. Potts* (h); *Phillips v. Hunter* (i); *Sell v. Worwick* (k). The question would be entirely different if a creditor, a subject of America, and residing there, claimed as the Bank here does. As to the *situs* of personalty, *Royal Bank of Scotland v. Stein* (l).

As to the American authorities cited, there is no decision come to at all in the case in *Selden*; the Court differed in *Hoyte v. Thompson*, pp. 332, 341; *Holmes v. Remnon* (m). The other cases cited do not in any way touch the question. In conclusion, Counsel submitted the following propositions:—

1.—The judgment in America was not a judgment *in rem*.

2.—That judgment only binds parties to the suit in which it was pronounced; and the assignees were no parties.

3.—The result of the decisions on the point is, that a subject of this realm, residing in it, bound by its laws, cannot be listened to when he attempts to contravene the laws of this kingdom; and,

(a) 3 H. & N. 617.

(b) 10 Q. B. 152.

(c) 4 T. R. 182.

(d) 12 Cl. & F. 368.

(e) 1 K. & J. 124.

(f) 3 De G., M. & G. 126.

(g) 2 Rose, Bank., 291, 315.

(h) 4 T. R. 182.

(i) 2 H. Bl. 403.

(k) 1 H. Bl. 665.

(l) 1 Rose, 462.

(m) 29 Johns. 229 (Rep. in Sup. Court N. Y.)

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therefore, whatever might be the effect of the adjudication, as against an American citizen, who claimed these goods under a judgment of the American Courts, the Northern Banking Company cannot be justified in so claiming them, contrary to the Bankrupt Laws of this kingdom.

*Cur. ad. vult.*

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*Judgment.*

LYNCH, J.

In this matter, a special case has been stated by and between the assignees of the bankrupt and the Northern Banking Company, whereby they submit to the judgment of this Court their respective rights and claims, arising out of the state of facts set forth in the special case. This case has been argued before me at considerable length, but not more so than its importance demanded. The leading facts of the case lie in a narrow compass, and briefly are:— John Robinson the bankrupt, in and prior to 1858, carried on trade in Ireland; and the Northern Banking Company are an Incorporated Company carrying on their business in Ireland; and they were creditors of the bankrupt in respect of a debt contracted in Ireland.

On the 16th of February 1858, John Robinson was adjudged bankrupt by this Court; and such adjudication was duly gazetted on the 25th of February 1858; and the case states that the Northern Banking Company had notice of the adjudication on the 28th of February 1858. The case then states the subsequent surrender of the bankrupt, and the choice of assignees. The case states that the bankrupt had sent goods to America, to his son, to be sold on commission. The case does not state where the goods were at the time of the adjudication; but I construe it as stating that the goods so sent had arrived, and were in America at that date.

On the 19th of March 1858, the Northern Banking Company took proceedings in the Supreme Court of New York, and attached the goods in question, then being within the State of New York. These proceedings were for the enforcement of the debt of the Bank, contracted in Ireland; and the attachment was a proceeding for security to answer the final judgment of the Supreme Court of New York.

On the 31st of March, a claim of ownership of the goods was made to the Sheriff of New York, in consequence of which an inquiry by a jury took place; and one of the assignees was examined. The case does not state the finding of the jury (if any), nor does it in any way show the result of this collateral proceeding; but it appears, in the documents, that the Northern Banking Company were compelled to *give a bond of indemnity* to the Sheriff; and thereupon, notwithstanding such claim, the goods were treated and dealt with as the property of the bankrupt. I think that the finding should have been stated, and that, where a proceeding like this is stated at all, the statement should be complete, and not left imperfect as now; and, as the object of all parties should be to have a satisfactory decision on the actual facts, that now an amendment should be made, stating the facts. However, I construe the statement as showing that the decision was in favour of the assignees' claim; as otherwise I cannot understand the statement that the Bank were compelled to give an indemnity, or the subsequent proceedings in America against the bankrupt.

The case goes on to state that the suit by the Northern Banking Company proceeded in America; a plaint was filed in the Court there, on the 29th of March, and a plea was put in by the bankrupt on the 21st of June, pleading his bankruptcy. Judgment was subsequently entered in that action on the 11th of September, and that is a judgment for the debt, and an award generally of execution therefor. However, on the 29th of September, there is an order in the action, regulating the operation of the execution on the judgment, and providing for a special defeasance.\*

It appears that the assignees intervened in that suit in America, by petition, on the 18th of September, alleging collusion in the parties

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\* NOTE.—The following is a copy of the order as appended in the schedule to the present case :—

“ At a Special Term of the Supreme Court of the State of New York, held in and for the City and County of New York, on the 29th day of September A.D. 1858.

“ Present, Hon. HENRY E. DAVIS, Justice.

“ The Northern Banking Company

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} On reading and filing affidavits and  
notice of motion, and on hearing Mr.  
Platt for the plaintiffs, and Mr. Board-

man for the defendants, It is ordered that the plaintiffs have judgment for the

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to the suit, and praying leave to commence an action, and for a stay of proceedings, on which petition a conditional order was granted by the Court; affidavits also were filed; but on the 28th of September an order was made for liberty to withdraw said petition, and that such withdrawal should be without prejudice to the rights of the petitioners.

Accordingly execution then issued, and on the 4th of October the Sheriff sold the goods, and distributed the amount, satisfying the judgment and *paying over the surplus to the assignees.*

The question now for my consideration is, "Whether the said Bank is liable to pay to the assignees the said sum of £791. 16s. 10½d., so received by them, under said proceedings in New York, or not? or the value of the goods sold at the time of the sale, or not?"

Now, in deciding this case, the first question that arises is, what is the effect and the extent of the assignment effected by the statute on the adjudication by this Court? What property passes thereby to the assignees, as far as the bankrupt's chattels are concerned? By section 267 of our Act 20 & 21 *Vic.*, c. 60, all the personal estate and effects of the bankrupt, present and future, "*wherever the same may be, vests in the assignees.*" This enactment is without limitation or stint, as large and comprehensive as words can announce it. I hold that, as far as our laws are concerned, the assignment is without any limitation whatever; and, in truth, the very question raised in this case shows that this is the operation of the statute; for the question raised is, whether, by the comity of nations, this vesting, pronounced by the Law of England, is to be recognised in America as altering the property in goods there? I do not think the laws of any foreign country are, in this respect, at all regarded by our Act; the property vests in the assignees as their goods by our law,

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amount claimed in the complaint, with the costs of this action, to be entered, but to be only enforced against the property attached by the Sheriff of the County and City of New York, in this action, and without any personal liability against the said defendants, and to be no lien on any property real or personal, other than that attached; and on sale of said property by said Sheriff, it is ordered that said judgment be satisfied and cancelled of record."

and, as far as our law can operate, it gives the absolute ownership and property in the goods, though in a foreign State, to the assignees. The judgment of Lord Eldon, in *Selkrig v. Davis* (a), and every other judgment on the point, bears out this primary proposition; and in no case is the operation of the laws of any foreign State regarded as a limitation introduced into our statutable assignment; our assignment is general and without limit; our law may be incapable of operation in a foreign State, unless our rule of property be there recognised; but this does not prevent the operation of our law, as between the subjects of this realm, working the entire assignment of rights.

But then there arises, in this case, a question as to what is the Law of America, or rather the State of New York in America, respecting such statutable assignment? Does the Law of New York recognise the effect of that assignment as passing the property in chattels situate within the boundaries of that State? This is properly a question of fact, the laws of a foreign State not being within our judicial cognisance, and, therefore, their existence necessarily being a fact to be established in our Courts. On this, as a question of fact, I am almost entirely without legal evidence; but both sides have, without objection, cited to me the American authorities, and neither were furnished with any legal evidence to lay before me. Had I considered that this was the principal point of the case, or that I was required to expound the American Law on this subject, I would require legal evidence to be laid before me respecting it, and I would not rely on my own research into the American authorities, as a proper foundation for a judgment in so serious a case. The authorities have been cited to me, and I have examined them. Very many conflicting *dicta* have been relied on on both sides; and the question as to what extent this friendly State adopts, by the comity of nations, our Laws of Bankruptcy, in respect of the assignment worked by our laws, seems to me a question of considerable interest, and, as to its extent, not well settled in the American tribunals. That they (or that we, in a similar case,) adopt such assignments as being as wide in their

1860.  
*Bankcy., &c.*  
*In re*  
ROBINSON.  
*Judgment.*

(a) 2 Rose, 291.



1860.  
*Bankcy., &c.*  
*In re*  
 ROBINSON.  
 Judgment.

operation there as we have made them, is certainly not true, nor would it be just that it should be so; the domestic creditor could not be affected by it without manifest injustice, and every State is authorised to protect its own subjects from the operation of a foreign law made for the protection of the subjects of such foreign State; therefore I think it is certain that our statutable assignment does not *per se* operate as a necessary transfer. But it seems to me that the American Law does not treat our assignment as a nullity; some authorities go the length of stating their actual recognition of it. Those on the opposite side, while denying the validity of the transfer, admit, at the same time, the recognition of the adjudication as ascertaining a representative character in the assignees, perhaps in the sense of an indefeasible power of attorney from the bankrupt to his assignees. Here, at all events, I find a recognition of our assignment, to the extent of recognising the assignees in their Courts as parties entitled to exercise rights and claims to the property of the bankrupt. In this case the proceedings in the suit in America were referred to as showing that the assignees' title is not at all recognised in the Courts there. I confess that these proceedings, as set forth in the case, are to me not fully intelligible. The plea raised the very question of the operation of our assignment; and if I had before me a demurrer to that plea, allowed by the American Court, or the proceedings as to the proof of it, it pleading a matter of fact, there would be ground for relying upon it; but at present I do not understand a *plea in discharge*, and next an order for judgment, with a special mode of execution. Unless by the submission of the defendant, I do not see how that judgment could have been awarded. But, in these very proceedings, I find that, a balance remaining of the goods seized, the Sheriff expressly states in his return that he has handed the surplus to the assignees, thereby recognising their claim.

Without, therefore, in this case, professing to expound the Law of America applicable to our statutable assignment, to this extent, at all events, I think it operates there, viz., that the assignees have, in the American States, a recognised claim to obtain the chattels of the bankrupt, and that the Courts there will recognise them as

entitled thereto ; whether as being already in possession, or only as having a claim enforceable, I do not now decide.

But now how stands the case on this view of the law, as at the lowest it is, in America? A creditor of the bankrupt has notice of the bankruptcy, has notice that this property has been assigned to answer his as well as the other debts ; and in contravention of our law, and to the prejudice of the other creditors, he proceeds in a foreign tribunal to obtain, according to their local laws, a preference for himself, by anticipating the proceedings of the assignee, in collecting the assets. I doubt how far this can be made a question of foreign law at all ; if the property passed by our law, and if the foreign State would aid in its recovery, at best the foreign law enables the assignee to recover the property of bankrupts, but it alters no property here ; and, after the recovery of it, the property is still assets of the bankrupt, and, I think, the party who has recovered it must answer for it here.

The foreign law was but a means for the creditor obtaining possession of the property which belonged to the assignees ; and the manner of obtaining that possession, collaterally to the real title, cannot alter the rights of parties in our Courts ; subject, however, to the question principally argued before me as to the effect of a judgment obtained, as the judgment was in this case, in a foreign Court.

It has been argued that this was a judgment *in rem*, and was the decision of a Court of competent jurisdiction on the very question of property in these goods. It is not necessary for me here to consider what would be the effect of such a judgment, obtained in a suit in which the assignees were not parties, and wherein the parties might, by consent between them, enable the Court to pronounce such a judgment ; for I have the judgment set forth in the case, and that judgment is an ordinary judgment of recovery in a suit *inter partes*, and awards a general execution to satisfy the judgment ; an order of the Court exists regulating the extent of the execution, and confining its operation to the goods in question, and making them the only subject-matter on which it shall operate. I am not informed, by any evidence, how this was pronounced ; but it seems to me sus-

1860.  
*Bankcy., &c.*  
*In re*  
ROBINSON.  
*Judgment.*

1860.  
*Bankcy., &c.*  
*In re*  
 ROBINSON.  


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*Judgment.*

picious in the extreme, in these proceedings, that the effect of the judgment was confined to the taking of the goods of the assignee (in which, perhaps, the bankrupt felt he had no interest), and acquits the bankrupt of all further liability in respect of the debt. I have said that the proceedings show no explanation of the judgment on motion in a contested suit—that it would seem such judgment must have been on some consent. But it is, on the point just now under consideration, not necessary to rely on any matter of this sort, for it seems to me perfectly clear that it is impossible to hold this, as is contended for, a judgment *in rem*.

It is argued, however, that the assignees had notice of the suit in America, and actually intervened in the litigation; and that, by reason of such notice, and by reason of their intervention, it became *quasi* a judgment *in rem*.

A judgment *in rem* is intelligible, and it is easy to understand why strangers to the judgment should be bound; but such a *quasi* judgment *in rem*, being effected by notice to a party not recognised in the suit, seems to me a proposition requiring very distinct authority for its sustainment, and an authority so high as would induce me to give up my perception of a very plain absurdity, in deference to its admitted weight. None such, nor any at all, has been cited for this proposition. But then it is insisted that the assignees interfered, and thereby made it in effect a judgment *in rem*, or, at all events, bound them by the judgment. This contention makes it necessary for us to see how they intervened, and to what extent. They first intervened by a claim of property on the original seizure; they pursued that claim until the Bank was compelled to indemnify the Sheriff for dealing with this as the bankrupt's estate. That was a collateral proceeding; it made the assignees no parties to the suit, and it ended certainly in no proceeding adverse to their rights. They subsequently intervened by petition, not as parties to the suit, but as third parties injuriously affected by its proceedings; they made no claim as parties; they sought an injunction to restrain the proceedings until they themselves instituted a suit. It was as strangers to the suit, but affected thereby, that they intervened; and how this could constitute them

*quasi* parties in the suit, I am at a loss to see. The intervention in the suit, and then abandoning their claim, is fairly used against them; but then it appears it was not by consent of parties merely, but by order of the Court itself, that they were allowed to withdraw without prejudice to their rights; and it seems to me impossible even fairly to contend that can now have the effect *per se* of concluding their rights.

Therefore, I am of opinion that this is not a judgment *in rem*, or a judgment *quasi in rem*, having the like validity. However, it is a judgment of a Court of competent jurisdiction, and necessarily commanding the respect of our tribunals, and bringing with it the sanction of such a decision. Were it a judgment in a suit in which the assignees were implicated, it would be a totally different question; but here it is *res inter alios acta*. The assignees cannot be bound by the proceedings in it; and simply as a judgment *inter partes* it cannot affect the claim of the assignees, who were no parties therein.

Therefore, I hold that there is nothing like estoppel in this case—nothing conclusive as a judgment *in rem* in this case. Is there then in the facts stated anything to give this payment in full to this particular creditor, in contravention of the rights of all the other creditors, a binding and conclusive operation here? This is an important question; the extension of trade with foreign countries, the growth of our foreign markets, make this a question of deep interest. Every manufacturer, of any extent of trade, has his market in foreign countries as well as at home, and his produce is to be found in foreign countries, and this is the legitimate carrying on of his trade *as a trader here*. Well, he becomes bankrupt—that is, as an honest man he confesses his insolvency, and tenders fair justice to all his creditors, in offering to them all his property for equitable distribution. Can it be the law that any creditor has a right to look out for some foreign nation, in whose territory part of the bankrupt's goods may be, and, gaining precedence of suit there, to proceed in contravention of the law made for his benefit, to gain for himself an unfair and inequitable distribution of the assets, in payment in full? The assets will admittedly go in a fair course of administration if he do not

1860.  
*Bankcy., &c.*  
*In re*  
ROBINSON.  
—  
*Judgment.*

1860.  
*Bankcy., &c.*  
*In re*  
 ROBINSON.  


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*Judgment.*

intervene. Is it not against equity and justice that the creditor should so intervene? This admits the law of America to be as contended for, and yet, even in that case, when I get back the goods here—in possession of the creditor so conducting himself—I cannot understand that such proceedings, so instituted to defeat the purpose of the Bankrupt Law here, and in violation of the rights created by it, have the effect of giving this creditor a right to hold the goods in violation of our law.

The fact that he obtained them by the intervention of the laws of a foreign State cannot, in my opinion, alter the property as established by our laws; and more especially when the very seeking of such intervention was in violation of the duties of citizenship here. But, though I say this, I by no means admit that the American law is open to any fair objection on this head. I think they recognise the title conferred on our assignees, to the extent that justice requires, protecting their own citizens from its unfair operation as far as they are concerned, but never intending to work it out so as to allow the foreign traders, for whose protection the law was made, to make their country a means of working out the defeat of their own institutions.

Perhaps the true ground of decision here is, that this is no question of foreign law at all; these goods are (or the produce of them is) in the hands of the Bank, still the property of the assignees. No suit in America or here, against the bankrupt, can affect the title of the assignees—not as a question of foreign law or domestic law—but by the rule that no man can be bound by the acts of a stranger; therefore the property is undisplaced, and is still in the assignees.

My judgment, therefore, is, that this money, the produce, and as I take it the value, of these goods, shall be paid by the Bank to the assignees. Perhaps this is not the full right for them, consequent upon my judgment; the expense of sale and other matters might be taken into consideration, and the value of the goods might be the fair measure of damages. However, I think it fairer, on the whole circumstances, to take the amount realised as the measure of damages; and certainly, unless pressed on this point by the assignees, I shall content myself with awarding this sum to be paid to the

assignees, together with the costs of these proceedings, on this special case.

I think the Northern Bank acted fairly, and in a mercantile view liberally, in submitting this case to the judgment of this Court, the tribunal by law established for the adjudication of the most important questions of mercantile law affecting the mercantile public, they having, however, as I am glad to feel they have, a right of appeal to the tribunal of the last resort upon the questions raised. But in submitting, as they have done, to this Court the question, I think they have acted in a liberal and commendable spirit, saving much expense and much time; and therefore my feeling is to make the judgment as light against them as I possibly can, and to give the relief only to the extent that, in any view upon my judgment of the case in dispute, could be awarded.

1860.  
*Bankcy., &c.*  
*In re*  
ROBINSON.  
*Judgment.*

—◆—  
In re SMITH and ROSS.\*

Dec. 16.

THIS case came before the Court on charge and discharge. Creditors of the bankrupt, named Lewis, had marked judgment on a bond passed by the bankrupt some time before the bankruptcy, and had filed a statutable affidavit to register their judgment as a mortgage; they filed no supplemental affidavit, pursuant to 21 & 22 Vic., c. 105. After the registering of this affidavit the bankrupts lodged their title-deeds of the premises sought to be affected by the affidavit with the Northern Banking Company, who claimed on foot of the equitable mortgage thereby created, as against the statutable mortgage, alleging that the affidavit registering the judgment was defective. The following is a copy of the affidavit in question:—

Statements in the title of a judgment mortgage affidavit may be incorporated, by reference, in the affidavit itself. A description of the residence of the parties, in an affidavit to register a judgment as a mortgage, will be sufficient if it be their ordinary trade residence. The description must be

substantially contained within the affidavit itself. Such affidavits need not be construed with strict grammatical accuracy.—[*M'Dowell v. Wheathy* commented on and distinguished.]

\* *Coram* LYNCH, J.

1860.  
*Bankty., &c.*

*In re*  
SMITH  
AND ROSS.

*Statement.*

“ Frederick Henry Lewis and William Robert Lewis, of Belfast, in the County of Antrim, trading under the firm of F. & W. Lewis, Plaintiffs;  
Alexander Smith and John Ross, both of Belfast, in the County of Antrim, trading under the firm of Smith & Ross, Defendants;  
And the 13 & 14 Vic., c. 29.

Frederick Henry Lewis, of Belfast, in the county of Antrim, merchant, aged forty years and upwards, one of the plaintiffs in this cause, maketh oath and

saith, that he, this deponent, and one William Robert Lewis, of Belfast aforesaid, by the name and description of Frederick William Lewis and William Robert Lewis, of Belfast, in the county of Antrim, merchants, did, on the 10th day of October 1856, and in or as of Trinity Term 1856, obtain a judgment in Her Majesty's Court of Common Pleas in Ireland, against the defedants in this cause, by the names and description of Alexander Smith and John Ross, both of Belfast, in the county of Antrim, builders, for the sum of £169. 9s., besides £7. 4s. 11d. costs, as by the records of said Court may appear. This deponent further saith that, to the best of his knowledge, information and belief, the said Alexander Smith and John Ross, the defendants in this cause, were, at the time of swearing this affidavit, seised or possessed of, or had disposing power, which they might, with the assent of any other person, exercise for their own benefit, over certain lands, tenements, hereditaments and premises hereinafter mentioned, that is to say (here follows the description of the premises). Deponent saith that the sum of £165. 5s. 8d., for debt and costs, still remains justly due and owing to this deponent, over and above all fair and just allowances, and that said judgment is still in full force and effect at law, and not vacated, satisfied, paid off or discharged.

“ FREDERICK H. LEWIS.”

(*Jurat* in usual form.)

*Argument.*

Mr. *Kernan*, for Messrs. Lewis.

Mr. *Heron*, for the Northern Banking Company, cited *Crosbie v. Murphy* (a); *M'Dowell v. Wheatly* (b); *In re Hams* (c).

(a) 8 Ir. Com. Law Rep. 301.

(b) 7 Ir. Com. Law Rep. 562.

(c) 10 Ir. Chan. Rep. 100.

LYNCH, J.

The discharge put in in this case raises the question whether an affidavit, filed in the cause of *Lewis and another v. Smith and Ross*, to secure a judgment mortgage on the lands of the defendants, the bankrupts, is sufficient; or whether, by reason of its deficiencies, in not complying with the requirements of the statute 13 & 14 Vic., c. 29, it is not null and void, as creating a charge on the lands specified in said affidavit? and this very serious question, when the consequences of the decision are considered, is now necessarily before me for adjudication.

Were this case before me without previous decisions existing, perhaps I should have no great difficulty in dealing with it, but it is not so circumstanced; and cases have been cited to me as authorities binding this Court, on the point now raised. *Crosbie v. Murphy* (a) is the latest case cited; but as to it, I find the real point there was at a late stage of the proceedings, and was only collaterally raised, and was upon a defect different from what is alleged in this case; therefore I have no duty cast upon me to consider that decision. Another case, and the one principally relied on, is the case of *M'Dowell v. Wheatly* (b). That is the decision of the Court of Common Pleas—a Court necessarily commanding the very highest respect from every one who knows the members of the Bench occupying that Court. It would be a presumption in me, indeed, to set up my judgment as questioning theirs; and I well know that any opinion of mine, adverse to theirs, would and ought to bear little authority in the legal world; but still I sit with all the responsibilities of a Judge, entrusted by the law with the adjudication of great and grave questions for the mercantile public, with full jurisdiction to determine such cases; subject, I am glad to feel, as others are, to appeal, but of superior jurisdiction, in determining the cases brought before me. Then I say, as to *M'Dowell v. Wheatly*, that it is not identical with this case before me. This is an affidavit made in a suit, containing in its margin the names, the titles, and the residences of the parties; and the objections in this case point more to one of the plaintiffs than to the defendants in the

1860.  
*Bankcy., &c.*  
*In re*  
SMITH  
AND ROSS.  
*Judgment.*

(a) 8 Ir. Com. Law Rep. 301.

(b) 7 Ir. Com. Law Rep. 562.



1860.  
*Bankley, &c.*  
*In re*  
SMITH  
AND ROSS.  
*Judgment.*

suit. There are grounds wherein this case is distinguished from *Mr. Dowell v. Wheatly*. I admit they are small grounds of distinction—I admit that they are little to be appreciated by the public outside of Courts of Justice—but (as I assume) they are distinctions sufficient to relieve me from the necessity of further considering that case; and, consequently, I will content myself with adjudging this case according to my conscience, and, as far as I am able, according to the rules of law, not irrespective of common sense; for, as I said once before, no case has yet ruled that, in construing these affidavits, I must lay aside all the promptings of common sense. When *Mr. Heron* produces for me such a case, I will go with him to the exposition of such affidavits, taking verbal technicality and *Lindley Murray* as my sole guides. I may add, in passing, that since I have come to this Court, in almost every case where a claim exists on a statutable judgment mortgage, in the first instance it has been attempted to discharge it grammatically, and pay it off by the rules of syntax; as yet, these discharges have not prevailed here. In my experience at the Bar I have seen Courts, both here and in England, seized, for a time, with a love of minute abstractions different from that used in ordinary life, and decisions run in currents founded on such love. Whether a vowel could be a Christian-name, and whether a consonant, being incapable of being sounded, could possibly be such, were questions on which learned judgments were pronounced. I saw a very learned Judge illustrating, as he thought, that a consonant could be sounded; but in that very case, when Chief Justice Blackburne was furnished with all the cases, and was told that the authorities were all uniform that way, I heard him very wisely declare that it was high time to have an authority on the other side; and thereupon it passed quietly into forgotten learning. Other classes of cases have gone on in like fashion upon technicalities that, looked back upon, surprise us; but love of minute accuracy becomes infectious, and rules men's minds for a time, until some Judge, impatient of subtlety tending to injustice, follows the course of the distinguished Judge I have named, and turns back the decisions to common sense.

In my judgment, to construe this Act with the verbal technicality now demanded at the Bar is to render the statute, instead of being a means whereby, at a small expense, a specific security might be obtained, absolutely a trap for the ordinary public, being a means of depriving a man of his security, if his attorney happens to be deficient in the rules of English grammar. He may have honestly intended a full compliance with all the requirements of the statute; and the affidavit may in itself show that such was the intention, and everything required may be in it in fact; but some part, by grammatical blunder, when examined, may stand only in recital, and not in averment—phrases, perhaps, utterly unintelligible to the poor man, who thought he had, by the Act of Parliament, a security for his debt; but, there being an undoubted grammatical error, his debt is lost, and he goes forth to the world a ruined man. Let me not be misunderstood. I do not say that the requirements of the statute need not be complied with; the statute giving the security points out the mode of obtaining it; and it is only in the mode pointed out that it can be obtained. A Judge cannot be wiser than the law; he must act under the law; and, unless he sees the law complied with, he cannot uphold the security. The law requires that the affidavit shall contain certain specified things, amongst them “the names, and the usual or last known place of abode, and the title, trade or profession” of the parties. All this, I admit, must be in the affidavit itself; for so says the law. But here my proposition begins:—How are we to look for the performance of these requisites? Is it with a grammatical microscope to find out flaws? Is it by construing the statute as saying that these requirements must be contained in fitting terms, in moods and tenses appropriate, in very words of accurate averment? Or is it, on the contrary, by expounding the law as applicable to the learned and unlearned alike, and looking to see if the affidavit was plainly intended to contain all that was required, and by looking to see if practically, no matter how unlearnedly, it is in it; in a manner, perhaps, not to be parsed by grammar rules, but yet giving to me (the Judge) materials wherefrom to say this information was intended? and, learning from itself this intention, I will read it as

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*Judgment.*

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*Bankcy., &c.*  
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 SMITH  
 AND ROSS.  
 Judgment.

there, if I can. I admit we must not look for aid outside the affidavit. The statements must be within it practically and substantially, not literally and grammatically; so I will then read it as there, and read it *ut res magis valeat quam pereat*: and, speaking with the deepest respect for other tribunals, it would seem to me a lamentable necessity which would compel me to leave men's properties at stake while I was weighing grammatically the relative pronouns in affidavits honestly made by them to secure those rights, on the faith of a public statute. I see no great end of public justice to be answered thereby, while I see individual calamity widely diffused. Influenced by these principles thus announced by me, I have taken up this affidavit, and I have examined it to see if it has all the requirements of the statute. I find in it the names of the parties, their title or trade, and their residences. A residence is given; why am I to suppose it changed? The names are given; am I to suppose the names are changed? Or should the affidavit go on to state that their names are still unchanged? Admit once this class of criticism, and where can you stop? It will be almost impossible to frame an affidavit to meet the captious criticism of ingenious minds; and in fact, in the end, the learned subtlety used to encounter verbal criticism will lead only to new traps for flaws. Let these affidavits be read as by men of sense and men of the world—a glance will generally show concealments and studied phrases intended to withhold information. Take the affidavit, and ask this question, would it convey to you the information intended to be given by the statute, so as practically to act on it? and if it does, and if I can so read it, I will not waste my brains on subtleties, or hide myself behind grammar rules, but I will expound the affairs of the world by the rules acted on in the world, by the learned as well as the unlearned; and I will not strip a man of his property because he mistook the collocation of his words, and mistook the proper particles to use in his sentences. I might, I feel, have found analogy enough in some cases to make my judgment but a yielding to authority; but I feel I would thereby shrink from a duty imposed upon me by my own position; and I could not satisfy my conscience in depriving this

gentleman of his property on the grounds put forward before me. If the Court of Appeal declare that I am mistaken in this course, I will believe them right; and I sincerely hope they may have the opportunity of correcting me, if wrong. I have not been able to learn the particulars of the cases lately decided by them. I believe that, at least, their judgment did not go in advance of the cases cited here. A fourth point was made, viz., that Belfast is not a sufficient residence; and the case *In re Hams* (a), decided by my Brother BERWICK, was cited. I entertain sincere respect for his decision; but the case is totally different, on a different Act, framed to answer a purpose entirely different. Here, Belfast was sufficiently descriptive in the judgment, as designating the parties. It is their trade residence—the ordinary style to address them by in the world; and their trading title is not the same thing as that of a person of the class such as was in *Hams' case*; and it would be indeed to introduce a new element of abstruseness into these affidavits, if I was forced to inquire into the size of the town and its population, in order to defeat, by external aid, such affidavits.

This very point shows itself the absurd lengths to which technical objections to these affidavits may be pushed. Thus deciding that this affidavit is sufficient, I must now adjudge as to the costs. I have given the claimants an exemption from the consequences of their negligence; and I have endeavoured to do them substantial justice notwithstanding; but, as their acts caused the expenses of this argument, and these proceedings, I will make them pay, out of the funds coming to them, the costs incurred by the Northern Bank.

(a) 10 Ir. Chan. Rep. 100.

1860.  
*Banktcy., &c.*  
*In re*  
SMITH  
AND ROSS.  

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Judgment.

1861.

Bankry., &c.

## In re ROBERT DELAHOYD, an Arranging Trader.

Jan. 16.

On the 3rd of November, R. D. filed a declaration of insolvency; on the 22nd of November, F., a creditor of R. D., with notice of the act of bankruptcy, seized the goods of R. D. under a *fi. fa.* On the 24th of November, R. D. presented a petition for arrangement, and obtained the usual protection order.

—*Held*, the order for protection operated against the previous seizure, so as to prevent the execution creditor proceeding to a sale.

The Bankrupt Court has jurisdiction to make an order restraining the execution creditor from proceeding.

Remarks on the *laches* of both parties in delaying the application to the Court.

THIS case came before the Court on motion, that the bailiffs in possession of the trader's goods under *fi. fa.* might be removed.

In the month of November 1860, several creditors of R. Delahoyd were proceeding against him, and, in order to prevent an execution, Delahoyd signed and filed a declaration of insolvency, on the 3rd of November, of which due notice was given to the creditors.

On the 22nd of November, the Sheriff, under a writ of *fi. fa.* issued at the suit of the Messrs F., creditors of Delahoyd, seized his goods in Queen-street. On the 24th of November, Delahoyd presented a petition for arrangement, and obtained the usual protection order, which was served forthwith on the execution creditors. After this the Sheriff's officers remained in possession.

Mr. *Sidney*, for the execution creditor, cited *Grace v. Bishop* (a); *Lewis v. Collard* (b); *Monk v. Sharp* (c); *Harrison v. Lawford* (d); *Williams v. Drury* (e).

Mr. *Heron*, for the arranging trader, cited *Fluvester v. McClenan* (f); *Ex parte Arnold* (g).

LYNCH, J.

In this case an application is made to me to have the bailiff now in possession of the trader debtor's premises in Queen-street withdrawn, on the ground that his continuance in possession is in

The rights of the execution creditor, in such a case, will be protected (in the event of the arrangement proving abortive), by the lodgment of a sum of money in Court, to meet his demand in that event.

(a) 11 Ex. 424.

(b) 14 C. B. 209.

(c) 2 Ex., N. S., 240.

(d) 6 Jur., N. S., 238.

(e) 29 Law Jour., Q. B., 86.

(f) 6 Jur., N. S., 1376.

(g) 3 De G. &amp; J. 473.

contravention of the protection order of this Court, granted on the 24th of November last.

It appears, upon the facts now before the Court, that, under the execution, a seizure was made on the 22nd of November, two days before the granting of the order for protection, and before the petition and affidavit; that the petition and affidavit made no mention of the material fact of the seizure, and that the further order, that the official assignee should be possessed, was made on the 24th of November.

The facts being before the Court, the first question raised before me is—quite irrespective of the manner in which these orders for protection and possession were obtained—what is the legal effect and operation of these orders? Had the execution creditor been so advised, he might have moved this Court to set aside the order for protection, as improvidently granted, or as obtained by suppression of the fact of his possession by seizure; or he might, if he could, have shown grounds why he should not be deprived of the benefit of his diligence; and this, coupled with the suppression I mention, might afford grounds to vary the order made. However, by these proceedings he would admit the validity of the order made, as affecting his rights, and they would have this injurious effect on his rights, viz., that, by the very simplest proceedings, his priority could have been levelled in any view of the law; and it is material here to remark that the proceedings to execution were taken with full notice of an act of bankruptcy so long since as the 3rd of November last.

But the execution creditor, instead of adopting any course of the kind I have suggested, preferred to question the legal operation of the orders made by the Court, as controlling “his” rights; and further, to question the jurisdiction of this Court to deal with the matter involved in this motion. I am, therefore, compelled in this Court, first, to consider whether the order of protection made here operates to prevent the execution creditor from proceeding to realise the property already seized, by a sale; and secondly, whether I have jurisdiction to deal with the matter of the motion.

Mr. *Sidney*, on behalf of the execution creditor, has argued the

1861.  
*Bankcy., &c.*  
*In re*  
DELAHOYD.  
*Judgment.*

1861.  
*Bankcy., &c.*  
*In re*  
 DELAHOYD.  
 —  
*Judgment.*

case with great ability and great clearness; but still he failed to give me any precise notion of his construction of the order for protection, or how he would define "process," so as to prevent a seizure under execution, while it allowed all subsequent proceedings to a sale. I fully concur with him, that process after the date of the order is only within the protection; but that proposition still leaves unanswered the question—what is process?

In the argument of this question, the general operation of the arrangement sections of the statute have been largely discussed. I have not the same feeling as Judge Macan sometimes expressed respecting this part of the Bankrupt Code. I think, in proper cases, and carefully administered, these provisions are capable of working out most useful ends—giving to creditors, where no frauds or unfair dealings exist, all the benefits to be arrived at in bankruptcy, and sometimes greater benefits; while the honest and unprosperous trader is saved from many hardships consequent on bankruptcy. I, therefore, for my own part, look on these provisions as highly beneficial in many cases, and demanding at my hands, when I see the case a proper one, a fair and anxious administration of its provisions. In working out its provisions, and as much for the benefit of creditors as for the petitioning trader, the Court is empowered, in the first instance, to make two orders; first, an order for protection of the trader and his goods from process; and, secondly, an order that the official assignee shall be possessed of the property of the trader.

These two orders seem to be intended to give the Court power to protect the property, pending the time necessarily to elapse until the creditors may pronounce their judgment on the arrangement offered, as effectually as bankruptcy could do—at least to the extent of preserving things in the state in which they were at the time of pronouncing these orders. In effect, when nothing has to be undone or nothing avoided, I think these provisions work out all the protection for property that could be effected by an adjudication; and, in my opinion, this was the intention of the Act in this respect.

But though I go thus far into the consideration of the enactment in these clauses, it is really only to see if any principle is to be found in them necessarily to be regarded as construing the words

"protection from process" so as to give them a limited and confined meaning, as here contended for. Now I find none such; but, on the contrary, I think the spirit of the law is in accordance with the full meaning of the words, taken in their natural interpretation; and, in my judgment, all the steps taken in the execution, the seizure, and the sale, are, in the natural meaning of the word, comprehended in the term "process." Therefore, the question here being, not whether the Court ought to make an order interfering with the rights which an execution creditor has obtained by his diligence, but whether the Court having made such an order consequently prevents the further proceeding to a sale, I am bound, in sustinment of these provisions of the statute, to rule that this order operates as a protection from the further proceedings to a sale.

But it is said that this Court has no jurisdiction to interfere; and further, that the Court out of which the process issued is the proper Court to apply to. Now this Court is enabled to give the protection; it pronounces the order, and, having authority to make the order, it has authority to compel its enforcement. I, therefore, will not further refer to the question of simple denial of this Court's jurisdiction in the matter.

But is the Court out of which the process issues the proper tribunal to apply to? Now, if the proceeding inferred the setting aside of any proceeding or order of the Court of Common Law, of course this Court would not be the proper tribunal to apply to; but, while the application is merely to uphold the order of this Court, and to control the operation of the Common Law process of another Court, in conformity with the legislative provisions, I think this Court is the proper Court to apply to. The Court of Common Law could not change my order; whereas I have jurisdiction and authority to take all necessary steps which may be necessary to make the operation of my order to be conformable to the equities and the rights of the parties; and, as far as the right of appeal is affected, I give a more substantial right of appeal, by assuming the jurisdiction; for to my order there lies the fullest and most solemn appeal the law has provided; and, in addition thereto, the case is disposed of by me at greatly less expense to

1861.  
*Bankty., &c.*  
*In re*  
DELAHOYD.  
*Judgment.*



1861.  
*Bankcy., &c.*  
*In re*  
 DELAHOYD.  


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*Judgment.*

the parties than if a motion had to be instituted in another tribunal. I, therefore, think that I am bound to exercise this jurisdiction, and that I would be wanting in duty to this Court if I sent it to another tribunal. The cases referred to were all properly brought before other Courts; for they questioned the acts done in those Courts, and required those Courts to set aside proceedings there, and have no reference to the exercise of a jurisdiction where no acts done in the other Courts are questioned.

I, therefore, rule that the order of the 24th of November operated as a protection from the process then in course of being executed, and still continues as giving such protection. But certainly in this case there has been great *laches*, and some impropriety of conduct on all sides. No motion on any side was instituted until this on which I am now acting. The execution creditor did not attempt to sell the goods; and the trader did not seek to remove the bailiff until now; and the action of the Court might be seriously impeded by this delay. I think it was the duty of the execution creditor to have come to this Court, and be relieved, if he had grounds therefor, from the operation of this order in staying his process, and then I could have moulded the proceedings, by reason of the suppressed fact of the execution being levied by seizure, as I thought consonant with justice; but he did not do so; and, without attempting further proceedings to enforce his execution, he merely continued the bailiff in possession. On the other hand, the trader debtor having this protection, and finding the jurisdiction of this Court questioned, lies by, and takes no steps for all that period to have the order made for his protection carried out. I therefore think that there was in this case culpable delay on both sides; and I will give no costs of this motion to either party, nor make any order in respect of the money paid by the trader during the time he held back from seeking the aid of the Court. I think there was a material suppression from the Court of the fact of the goods being seized in execution. This fact should have been stated in the affidavit. I cannot say whether or not it was verbally stated in Court, and I have no memory whatsoever about it; but it is a fact that should have been formally brought forward. In fact, the affidavit implies the fact not being as it was;

and, had the execution creditor submitted the case to me in reasonable time, in whatever rule I made I would have given him the costs of the motion. I will not decide now, as the case is before me, by whom they are to be paid; but the execution creditor preferred to stand obstructively, and not actively, upon his rights, against the jurisdiction of the Court; and of course I cannot, in such circumstances, give him costs, or allow him for expenses paid under such circumstances. But I will protect the execution creditor to the extent which I think justice requires; he had priority of execution, and had the protection afforded by the custody of property sufficient to answer his demand. I will not allow him to be deprived of this right, if the arrangement shall hereafter fall to the ground; but I will direct that a sum of £40 be lodged in Court on or before a certain day, to abide the further order of this Court, in respect of the rights of the execution creditor; so that, if the arrangement proceedings become inoperative, he may stand in the same position as if the order for protection was not pronounced; and he will be at liberty to attend the second sitting, and show cause against the confirmation of the offer, if he can do so on any grounds. His expenses, up to the time of the pronouncing the order for protection, I think he should have; whether with his demand, or in full, I will decide at the second meeting. But for the notice of the act of bankruptcy, his *laches* in not applying here, and his attempt to oust the jurisdiction of this Court, I would require those expenses to be paid in full; but, at all events, I think it will be fair at least to add them to his demand. My order then is, that the bailiffs be withdrawn, and that the official assignee shall continue to be possessed of these goods, on condition that the sum of £40 be lodged in Court to the credit of this matter, to abide the further order of this Court, to be pronounced at the second meeting for arrangement, and that each party shall abide their costs of this motion.

1861.  
*Bankry., &c.*  
*In re*  
 DELAHOYD.  
 Judgment.

1861.

Bankcy., &c.

## In re BARTHOLOMEW COURTNEY, a Bankrupt.\*

Feb. 13 14.

It is not necessary that the warrant committing a bankrupt for unsatisfactory answering should state that the questions were put by the Judge, or that such should have been the fact. The words "by and before me," at the commencement of the deposition, are sufficient.

In order to discharge the bankrupt, the Court before which he is brought on *habeas corpus* must be fully satisfied that the Judge below was wrong in committing him.

The question to be decided in each case is, whether the answers of the bankrupt are such as would satisfy the mind of a reasonable man.

In this case the bankrupt had been committed for unsatisfactory answering, relative to his property, on the 3rd of February. A writ of *habeas corpus* having issued, he was, on this day, brought up pursuant to the writ. The facts of the case appear sufficiently from the several judgments.—[For the judgment of BERWICK, J., *see note*.]

Mr. *D. C. Heron*, with him Mr. *Levy*, for the bankrupt, cited *Ex parte Cassidy* (a); *Ex parte Lee* (b); *Walker's case* (c); *Ex parte Blackstone* (d); *Ex parte Fitzhenry* (e); *Ex parte Oliver* (f); *Miller v. Seare* (g); *In re Ward* (h); *Ex parte Ramsden* (i); *Ex parte Ward* (k); *Ex parte Martin* (l).

Mr. *Kernan*, in support of the committal, cited *Ex parte Hickie* (m); *Ex parte Downing* (n).

Mr. *Levy*, in reply, cited *Ex parte Bradbury* (o); *In re Lord* (p); *In re Nolan* (q); *Langhorne's case* (r).

(a) 2 Rose, 217.

(b) 2 M. &amp; Ayr. 217.

(c) 1 Gl. &amp; J. 371.

(d) 7 B. &amp; C. 674.

(e) Mol. 35.

(f) 1 Rose, 407.

(g) 2 W. Bl. 1149.

(h) 1 Bail Ct. Rep. 126; S. C., 10 Jur. 433.

(i) 1 Bail Ct. Rep. 133.

(k) 6 M. &amp; W. 642.

(l) 2 Bail Ct. Rep. 33.

(m) 10 Ir. Eq. Rep. 432.

(n) 8 Ir. Law Rep. 492.

(o) 18 Jur. 189.

(p) 16 M. &amp; W. 462.

(q) 6 T. R. 119.

(r) 2 W. Bl. 918.

\* *Coram* FITZGERALD, J., in the Queen's Bench Chamber.

FITZGERALD, J.

In this case, in which a writ of *habeas corpus* had been issued on a former day, an application has been made to me, on the return of that writ, to discharge the bankrupt, Bartholomew Courtney, who has been committed under an order from the Court of Bankruptcy and Insolvency, for unsatisfactory answering, on two several days, before Judge BERWICK in that Court.

An objection has been made, in the first instance, which, if well founded, I should consider a substantial objection; namely, that it appears from the depositions in respect of which this committal has been made, and which I am to consider as incorporated with the warrant, that the questions, upon the answers to which the committal was founded, were not put by the Judge of the Bankrupt Court; and it has been argued that it is absolutely necessary that they should have been so put. In support of this proposition the case of *Ex parte Cassidy* (a) has been cited; but, as I intimated in the course of the argument, I do not consider that case as at all ruling such a point; and I should certainly require express authority for holding such to be the law. I have been unable to find any such authority, nor have I found in the text-books or in the Act of Parliament any foundation for such a proposition. Such a rule may have prevailed when commissions of bankruptcy were carried into operation by officers whose duty was merely ministerial; but now the Legislature has thought fit to alter that, and the Judges of the Court of Bankruptcy are Judges of a Court of Record, with the fullest powers of such a Court; and the objection made is, that it does not appear that the Judge, with his own mouth, put these questions to the bankrupt. However, I am relieved from any difficulty, for, on looking at the deposition itself, I find it commences, "Bartholomew Courtney, the bankrupt in this matter, being sworn and examined, the day and year and at the place first mentioned, *by and before me*;" and this is the language of the Court itself, the depositions being signed by the Judge.

The greater number of the questions were, of course, put by Counsel, as is absolutely necessary for the ends of justice, the Counsel

(a) 2 Rose, 217.

1861.  
*Bankcy., &c.*  
*In re*  
COURTNEY.  
Judgment.

1861.  
*Banktcy., &c.*  
*In re*  
 COURTNEY.  
 Judgment.

being conversant with, and the Judge ignorant of, the facts of the case, and the Judge merely interposed where he thought it necessary; and I find the concluding question in these depositions, covering the whole of them in fact, is put by the Judge, "Have you no other or fuller explanation to give of the loss of that £600, between the 1st of October and the 7th of December, mentioned in your special balance-sheet, than what you have already given?" This being the state of the depositions, I should be prepared to hold that every question in them was put "by the Court," if such a ruling were necessary; but I do not hold it to be so. But it is further contended that, this person being committed under section 388, for unsatisfactory answering, his answers, looking at the whole deposition, are satisfactory, and that I should, therefore, discharge him.

It will be well to see what is exactly the question which I have to determine here; and it is conveniently laid down in the case of *Ex parte Legge (a)*. Coleridge, J., in page 170, says, "Without going the length of saying that the Commissioner would have been wrong in coming to a different conclusion, I think it sufficient that I do not see that he was wrong in deciding as he did; and I, therefore, think that this rule must be discharged."

The question is not whether, if I were originally hearing the examination of this bankrupt, in the Court of Bankruptcy, I might not have come to a different conclusion; but whether I am now satisfied that the Judge was wrong in coming to the conclusion he has arrived at? The rule in the above case is substantially taken from the language of the Lord Chancellor, in *Ex parte Oliver (b)*. Of course, if I was of opinion, in this case, that the answers of the bankrupt were clearly satisfactory, it would be my duty to discharge him. This has been frequently a matter of discussion, both in this country and in England, from the time of *Perrott's case* to the present time. When *Perrott's case* was decided, the Commissioners of Bankrupt were merely ministerial officers; whereas now the Court is a Court of Record in Law and in Equity, and the Judges of the Court possess a jurisdiction even more extensive than that of any other Court. At that time the Bankrupt Code was sanguinary and

(a) 1 Low. & M., B. C., 163.

(b) 1 Rose, 413.

ferocious. Indeed I find, in a very interesting note to the report of *Perrott's case*, in *Green on Bankrupt* (2nd ed., p. 209), that he was executed on a gallows, in Ludgate-hill, on the 11th of November 1761, for "concealing his effects." When such was the character of the law, considerations and arguments might prevail, which have no force now that the whole character of the Bankrupt law is altered, and the great powers of the Court of Bankruptcy are exercised by the Queen's Judges, not only with the greatest humanity, but for the benefit and protection of bankrupt traders.

There is an important case, not adverted to in the course of the argument, *Ex parte Caulfield* (a), in which the same arguments were adduced as in *Perrott's case*, and in the present; and, in giving judgment, Burton, J., says:—"Another case, *Ex parte Nolan* (b), is much to the same effect. The plain principle by which to be guided appears to be this: if a man fairly, and without equivocation, tells a matter of fact, whereby he proves himself guilty of fraud, he is not, on that account, to be committed; but if he makes statements of such a nature that no reasonable man can believe them, he ought then to be committed." That is the true distinction to take. If, for instance, in the present case, the bankrupt had admitted, with reference to the loss of the £600, that he had made away with it; this, though criminal, would not be a ground of committal, if he had answered truly. The case of *Ex parte Nolan* is referred to by Burton, J., with approbation, particularly the language of Lord Kenyon, in p. 120; "The question, in each particular case, is, whether the answers given by the bankrupt be, or be not, sufficient to satisfy the mind of any reasonable person?"

Now, that being a case thus approved of, and acted upon, appears to me to furnish a satisfactory rule as to the present case—a rule which in practice I have known frequently acted upon; and the case of *Ex parte Miller* (c) is the only one in which a contrary rule seems to have prevailed. There, certainly, the bankrupt was discharged, upon answering which would have appeared to me

1861.  
*Bankr., &c.*  
*In re*  
COURTNEY.  
Judgment.

(a) 5 Ir. Law Rep. 358.

(b) 6 T. R. 118.

(c) 3 Wil. 420.

1861.  
*Bankroy., &c.*  
*In re*  
 COURTNEY.  
 —  
*Judgment.*

most unsatisfactory. *Miller's case* is one which, I must say, I should decline to act upon. However, I shall mention a case which is not in the Reports, but in which I myself was Counsel, before Pennefather, C. J., in 1845, in which *Miller's case* was approved of. In that case (*In re Stokes, in the matter of Piller a bankrupt*), the learned Judge acted on the case of *Ex parte Miller*; but I did not at the time, nor do I now, think his judgment \* a satisfactory one. I shall only advert to one other authority, *Ex parte Langhorne (a)*.—[The learned Judge here stated the facts of that case.]—There, answering similar to the present was held unsatisfactory, and the prisoner was remanded. Now, in considering this case, the question is, does it appear to me, on the whole examination, that the answers of the bankrupt were satisfactory? and, acting on the rule in *Ex parte Legge*, I must be satisfied that the Judge of the Bankrupt Court was wrong. A very proper course was pursued in this case;

(a) 2 W. Bl. 919.

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\* The following MS. note of the case *In re Piller (coram Pennefather, C. J., in Chamber, 7th of February 1845)* has been kindly supplied by the Right Hon. Mr. Justice Fitzgerald :—

*J. D. Fitzgerald* and *Meagher* applied for the discharge of the bankrupt, who had been committed by Commissioner Macan, for not answering to his satisfaction. The prisoner was brought up under a writ of *habeas corpus*; and the Marshal returned the writ. A great many objections were taken to the form of the warrant; but they were all overruled. It appeared, however, upon the warrant, that the questions put by the Commissioner in the commencement of the examination were not set out. Then there was a statement that the Commissioner questioned the bankrupt, and then propounded the following question; and the examination proceeded, setting out question and answer; and the warrant concluded, "which answer of the said R. K. Piller being unsatisfactory," &c., I objected that all the questions should have been set out, as the conclusion referred to the whole.

*Creighton, contra.*

*Held*, a fatal objection; and the bankrupt was discharged.

I inclined to the opinion that the above objection was not tenable, but that several of the others were; especially that the bankrupt, being a Quaker, the warrant merely stated the examination to have been "being duly affirmed"—*Ex parte Beeton* (2 Jur. 636)—and that the commitment was, "until he submit himself to me;" in place of "to the Commissioners, or either of them." The case was argued at great length, and almost all the authorities cited; but particularly, for the prisoner, *Ex parte Vogel* (2 B. & Ald. 224); *Ex parte Isaac* (M. & M'A. 27), and *Foxley's case* (1 Salk. 351), to show that the statutable power should be

when it appeared that there was a difficulty in accounting for certain property of the bankrupt, he was called on, for a special balance-sheet, which is one of the best modes of testing the *bona fides* of a bankrupt that can be adopted. In that balance-sheet the bankrupt proceeds to account for this property; and what he says is substantially this:—On the 1st of October, I had stock to the amount of £100; between that and the 5th of December I got about £1400 worth of goods; and then, in about ten weeks, I sold about £1100 worth, and lost on the sales £600; and he then attempts, in other ways, to account for the residue, having, at the latter date, £400 worth of goods on hands. Well, the loss of this £600 became the subject of inquiry; and the course taken with the bankrupt appears to me to have been very proper. It has been called a cross-examination. Be it so; he had the advice and assistance of his own Counsel during the entire of it. It was, no doubt, an adverse examination. His attention was called to the £600; the question was put to him in every shape, and still it appears he could give no other account of it than that he lost it on sales. But let us see is this explanation as to the £600 “satisfactory.” He is asked to

1861.  
*Bankcy., &c.*  
*In re*  
COURTNEY.  
Judgment.

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strictly pursued; and also, on the same point, *Evans v. Rees* (12 A. & E. 55); *Re Mather* (2 Strange, 880; Comb. 391; S. C., Ray. 861).

As to “which answers,” &c., *Hadland's case* (1 D., P. C., N. S., 835). That only formal defects were cured by section 52: *Crowley's case* (2 Swan. 80); *Casidy's case* (19 Ves. 326; S. C., 2 Rose, 217, 400); and *Ex parte M<sup>r</sup> Gee* (6 Madd. 206). The commitment was before surrender; and it was urged that the bankrupt could not be committed before the forty-second day; and *Rex v. Walters* (5 C. and P.) was cited; but the objection was overruled.

On the same day, and in the same matter (*Ex parte J. L. Stokes*), *J. D. Fitzgerald* and *Codd* applied also for the discharge of Stokes, a witness committed for unsatisfactory answers. Some of the answers appeared improbable; but one could not say they were untrue. The only question argued was that, upon the whole, the examination was not, to a reasonable mind, so unsatisfactory as to warrant a committal.

The following cases, amongst others, were cited in support of the application:—*Ex parte Oliver* (2 V. & B. 244); *Norris' case* (2 Jac. & W. 437); *James' case* (3 Dea. 518); *Miller's case* (3 Wils. 420).

*Creighton*, contra, cited *Ex parte Bardwell* (1 M. & A. 193); *Ex parte Caulfield* (5 Ir. Law Rep. 359).

The Chief Justice discharged the prisoner, adopting the view of Eyre, J., in *Miller's case*.



1861.  
*Bankcy., &c.*  
*In re*  
 COURTNEY.  


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*Judgment.*

whom did he sell these goods; he is asked to give the name and description of a single individual to whom he sold; as it is obvious, if he gave the names, inquiries could be made as to the truth of his statements. He is unable to do so. He is then asked to state the quantities sold, and cannot state them. The questions are put in every possible shape; but his whole explanation amounts to this—"I got £1400 worth of my creditors' goods; I sold, within ten weeks, what cost me £1100 for £500, losing thus £600; but I cannot tell the quantities I sold, or the persons to whom I sold them."

I was quite prepared to give my opinion upon this case yesterday; but, as it involved a question of personal liberty, I thought it right, before giving judgment, to read over the whole of the depositions. Having done so, and confining myself merely to this sum of £600, my opinion is, that the explanation offered is most unsatisfactory. I know not whether he has concealed it—whether it has followed the other money to America, with a view to the bankrupt himself following it there; but I cannot give credit to his answers respecting it. I entirely concur with the course adopted by the Judge of the Bankrupt Court. I think he has well exercised his jurisdiction in committing this man. It is not because it would be competent for the creditors of this bankrupt to punish him in any other way, that I should not allow this committal to stand. The imprisonment is not for life; for he has only to come before the Judge at any time, and give a true account of this matter, and state the circumstances under which he sold these goods at a sacrifice. If he does so, he will be entitled to his discharge. As to the sum of £200, alleged to have been paid to the bankrupt's brother, if it were necessary for me to form an opinion I should come to a similar conclusion. Those accidental meetings with the brother in Liverpool are all most unsatisfactory; but it is not necessary for me to found my judgment on that. The Judge committed this man for unsatisfactory answering as to the £600; for I find by question 301, put by the Court, after giving the bankrupt time to consider, the Judge asks him, "Have you no other or fuller explanation to give me of the loss of that £600?" &c.

I am quite satisfied that the Judge was right in committing the bankrupt; and the only order I can make is a remand.

Prisoner remanded accordingly.\*

1861.  
*Bankcy., &c.*  
*In re*  
COURTNEY.

*Judgment.*

*Feb. 2.*

\* The final examination of this bankrupt had been adjourned from the previous day. He had carried on business as a provision dealer at the Bullring, Drogheda. He had stated, in his special balance-sheet, a loss of of £600 on the sale of goods to the value of £1150, which he alleged had occurred between the 1st of October and the 7th of December 1860. These goods consisted chiefly of American bacon, supplied by several eminent men in that trade in Liverpool and Dublin. He kept no books; and he was unable to vouch his account of the loss by any documentary evidence.

Mr. *Kernan*, for the assignees.

Mr. *Heron* and Mr. *Levy*, for the bankrupt.

The examination of the bankrupt having been brought to a close on the previous day—

Mr. *Kernan* applied that he should be committed for unsatisfactory answering.

*Feb. 3.*

Mr. *Heron*, in reply.

BERWICK, J.

*Judgment.*

In this case I am called on to perform one of those painful duties which sometimes devolve on Courts of Justice, by committing, under the 385th section of the Bankruptcy Act, the bankrupt now before me, because he has not answered the questions put to him fully, and to the satisfaction of the Court. I disclaim altogether the supposition that any committal under this section was for the purpose of punishing perjury. There may be perjury committed before me, and sometimes, I am sorry to say, there is; but I am only justified in making use of the powers given by that section, for the purpose of a discovery for the benefit of creditors, who tell me that there was property belonging to the bankrupt which had not been accounted for, which the bankrupt had the power of accounting for, but which he refused or evaded doing. If perjury were his only offence, or if he fraudulently removed property, or gave fraudulent preferences, the Act of Parliament, and the Criminal Law of the country, provide the proper punishments. The section in question is only applicable where the Court thought that there might be property made available for the benefit of the creditors, through the evidence of the bankrupt. The questions here are, whether the explanations which the bankrupt has given, first, as to the loss of £600, which, he stated, had taken place between the 1st of October and the 7th of December 1860, and, secondly, with respect to an alleged payment made—as his schedule stated, in October, and as his evidence stated, in November—to his brother, were such as, in the words of one learned Judge, whose authority has been cited in argument, would “satisfy the mind of any reasonable man,” or, in the words of another, amounted “to such a story as a reasonable man would believe?” The bankrupt’s statement was, that he had received in goods from different creditors, set forth in his schedule, to the value of £1535. 12s. 2d.; and that, deducting £400 for goods still on hands, there remained about £1135 to be accounted for, of which he said he had lost £600. Has he shown probable cause for having lost that sum between the dates specified in the special balance-sheet, namely, the 1st of October and the 7th of December? There are two authorities which, to some extent, guide me, as to the feeling of

1861.  
*Bankcy., &c.*  
*In re*  
 COURTNEY.  
 Judgment.

Courts with respect to general statements of loss like that. One was a very old authority, the *Case of Thomas Langhorne*, reported in *Sir William Blackstone's Rep.*, p. 919, vol. 2. It was a more exaggerated case than this, but still of the same description. The bankrupt stated before the Commissioner that he had lost £1886, by selling goods under prime cost. That deficiency did not appear in his books; and the reason he gave for its not so appearing was, that his brother was his shopman, and he was afraid lest he might become acquainted with the nature of his dealings, and hurt his credit by divulging them. The Commissioner decided that that answering was not satisfactory; and his decision was upheld by a Superior Court. The other was *Perrott's case*, in which there were dealings to a large amount, namely, £13,513, from the time of the bankrupt entering into trade to the date of the bankruptcy. A deficiency of £3513 within that period appeared; and the bankrupt was asked to give a true account of how that money had been disposed of. The answer was that, on goods sold during the last year, he had lost upwards of £2000, and on mournings £1000; and that, for nine or ten years past, he had been extravagant, and had spent large sums of money. That answering was decided by the Commissioner to be unsatisfactory. The case went before Lord Mansfield, who likewise held that it was insufficient and unsatisfactory; and the bankrupt was remanded. A sum of money was afterwards found, which the man had secreted in a chair; and he was executed. In the present case, the statement of the bankrupt that he had lost the money, not within two or three years, but within the period to which he had confined it, and on goods bought in during that time (not goods on hands), appears to be so monstrous that no reasonable man could possibly believe it; and there was this strange fact, that the loss was incurred on goods charged not at retail, but at wholesale price. The only suggestion that the bankrupt made, to account for this immense loss, averaging £65 to £70 per cent. on the American bacon, and from £30 to £35 per cent. on the other goods, was, that the goods were so bad—so deficient in weight and in quantity, and contained so much waste, that he lost in consequence. These goods were not bought from new customers, but from wholesale dealers, with whom the bankrupt had been dealing from the period he began business in 1854 up to the present time; and there was no suggestion made by the party himself that he made the slightest complaint with respect to the quality of those goods during the period that he alleged he had those losses. His schedule began with the 1st of January 1860; and he put himself forward as having been then comparatively a solvent man, because at that date he only alleged a deficiency of assets to the amount of £112. 13s. 5d. Now he had been dealing with those parties for upwards of five years; and, in reply to a question from me, he said that no sum was due on that day to any one of the four persons who supplied him with the American bacon, and to whom he attributed such an immense loss; that is, he had been up to that time, for five years, dealing with them in this description of bacon, which, he now alleged, was so bad that he had lost from £60 to £65 per cent. upon it; and yet, instead of having a loss of thousands upon that day, if his statement were true, he had no loss whatsoever, save the deficiency of £112. More than that; he was then clear with them: and the Court was asked to believe that, having known and expostulated with them for years on the quality of the goods they were supplying, he then began a new account with them for the self same description of goods, and went on dealing with them until he became a bankrupt. The statement in the schedule (before the special balance-sheet was filed) was that he lost the £600 by being obliged, from competition in trade, and the deterioration of the goods, to dispose of them under invoice

price, within the period from the 1st of January to the filing of the schedule, thus distributing the loss over a whole year. On that statement alone I certainly would not have been inclined to commit him. In the course of a year, comprising dealings of the kind, a man who kept no books might have a general idea that he had lost £600; and the fact might be so; and yet he might be unable to give the Court any further explanation of it. But then he was called on to give the special balance-sheet; and in that document he limited the loss to the period between October and December; and upon it the present questions have arisen. It should be borne in mind that, from the 1st of January to the 1st of October, he had been, according to his own account, getting the bad goods from those very same parties, with, in some cases, expostulations, but nothing more. Yet the extraordinary result of his schedule and balance-sheet was that, while he had no loss upon the goods which he got, with complaints as to their quality, between January and October, he did lose £600 on goods received, without making any complaints about them, between October and December. Another fact in the case is, that the bankrupt's father and cousins, or, at all events, the latter, had dealt with those very same alleged fraudulent suppliers of wholesale goods during the whole of the time, and were dealing with them, he believed, still. The Court is asked by the bankrupt to believe that, after he was tired complaining of those parties, he still went on dealing with them, and made no complaints whatsoever in the matter. Without saying that he was a person who properly understood book-keeping, still his accounts and letters showed intelligence. He has produced one book for the purpose of assisting the Court. That book was full of mutilations; perhaps his explanation of those mutilations was sufficient; I would not say it was not. He said that he had allowed his children to tumble it about and tear it, and that he himself used occasionally tear out a blank leaf, for the purpose of writing an account. This book, however, told in a way opposite to that for which he produced it; for it showed the Court that the bankrupt did, on some occasions, closely investigate the weight of goods supplied to him; that he made an accurate comparison between their real weights and the invoice weights, and marked the result down, even to the pound. On referring to the prices given in that book, at which the bankrupt sold during the two months, it does not bear out the bankrupt's statement about the loss. The letters which had passed between the bankrupt and Mr. P. Kehoe also weighed with tremendous weight against the statements of the former. Mr. Kehoe was one of those who had been roundly charged by the bankrupt with selling him goods which were contrary to sample, and who, if the bankrupt's statement were true, might, within the last four years, have had actions brought against him for losses sustained thereby; yet that had not taken place; nor was there any suggestion that the bankrupt sought to reduce the amount of Mr. Kehoe's bills when they came in for payment. As to the letters which passed between the bankrupt and Mr. Kehoe in the month of October, being orders for goods, they contained no complaints as to losses through bad quality or deterioration of goods; nor any suggestion of an abatement of price on that account. On the bankrupt's own evidence as to his sales, any person who calculated from the figures he gave would find it impossible to believe that he lost £600 within a period of nine or ten weeks. Although the bankrupt's manner was, in many respects, that of a man who wished to expose the true state of his affairs as well as he could, yet I am obliged to come to the conclusion that his statement was not borne out by evidence, and was in fact untrue. Then I come to a part of the case which is full of mystery, namely, the bankrupt's dealings with his brother. He stated that, six or seven years ago, he borrowed from his brother, for the pur-

1861.  
*Bankcy., &c.*  
*In re*  
COURTNEY.  
*Judgment.*

1861.  
*Bankcy., &c.*  
*In re*  
 COURTNEY.  
 ———  
*Judgment.*

poses of trade, a sum of £500. There was not a tittle of evidence to sustain that, except his own statement. His brother has not appeared. The repayment of that sum by the bankrupt to his brother appears to me to be one of the most romantic stories that ever came into a Court of Justice. The bankrupt, knowing that his brother was in Liverpool in 1856 or 1857, went over there, and met him in the docks by accident. The brother had been living there for some time; but the bankrupt never inquired for his lodgings, but went with him to a public-house, and there paid him £200, for which he never got from him a scrap of writing; after which he came back to Dublin directly. The very same thing occurred in November last, with respect to the repayment of the remainder of the debt, the brother being then about to go to America! Was it not extraordinary that, at a time when the bankrupt was trying to keep on terms with his creditors, he should, without any previous arrangement with his brother, or letter from him, saying that he was going to America, and wanted the money, suddenly take it into his head to go over to Liverpool, meet him by accident in an eating-house, and give him the money there? A receipt, signed by his brother, for the whole sum of £390, had been produced; and there was this further piece of evidence, that the brother stated that, if he should not set up in trade in New York himself, the bankrupt should have the money back. There is very strong reason to suspect that the money was put into the brother's hands for safe keeping, until this whole matter should have blown over. I, therefore, feel obliged to put into the order which I am about to make for the committal of the bankrupt, that he has answered unsatisfactorily with respect to both of the matters referred to, namely, the loss of £600, and the payments to his brother. It has been urged, on behalf of the bankrupt, that, if he has answered to the best of his ability, such an order might amount to perpetual imprisonment. I feel that very strongly; but, if it should press upon the bankrupt, the appeal must be made to the Legislature, not to the Court. I regret to say that that is the only answer I can give to that suggestion on behalf of the bankrupt. If Mr. Kernan's clients, or any gentleman engaged in the case, have any reason to believe that the bankrupt had those dealings with his brother, they would be bound to inform the Court of it.

Mr. Kernan said the trade assignee had desired him to say that he knew nothing at all of the dealings of the bankrupt's brother; but, if anything of the sort turned up, it would be in the power of the Court to bring up the bankrupt for further examination.

The warrant for the committal of the prisoner was then made out.

1861.  
*Bankcy., &c.*

In re FREDERICK SANDERSON.\*

May 23.

F. SANDERSON carried on the trade of cab-builder in London, for a considerable period previous to November 1860, when he gave up business there, and removed to Dublin, and carried on the same trade at Dominick-street, in that city.

On the 17th of April 1861, the trader being in London, a creditor's petition was presented against him, to Mr. Commissioner Fonblanque, and he was, on that day, adjudicated bankrupt, the act of bankruptcy being a declaration of insolvency, dated the 13th of April. In the petition in England the bankrupt was described as "Frederick Sanderson, of Dominick-street, Dublin, Ireland, and of Tottenham-street, London." The ordinary statement of his trading for six months previous to the petition, within the jurisdiction of Mr. Commissioner Fonblanque's Court, was stated in the petition, and the usual proof of trading was given.

The time of a trader's "residing or carrying on business in Ireland" (s. 31) means the time of presenting the petition. The Irish Court has exclusive jurisdiction over such trader, though he owe debts contracted in England, while he was residing and trading there.

Statement.

On the 14th of May 1861, a creditor's petition was presented to this Court against the bankrupt, and adjudication thereon, the act of bankruptcy being non-payment after a trader debtor summons. Cause was now shown by the bankrupt and the English assignees, against this adjudication in Ireland.

It appeared, from the evidence of the bankrupt, that he had resided and carried on business in Tottenham-street, London, for twelve months prior to November last; that was his only residence or place of business during that time. In November, he and his family came to Dublin, and he opened business in Dominick-street, and carried it on there until the English messenger took possession. Since November last, bankrupt had been several times in London, but did not carry on business there, except by the purchase of goods. He stopped business in London, on the 18th or 19th of November; but his shop there remained open for the purpose of being let, he having an interest in the premises, and having a care-

\* *Coram LYNN, J.*

1861.  
*Bankcy., &c.*  
*In re*  
 SANDERSON.  
 Statement.

taker in charge of them. At the time of the English adjudication, there were debts due which had been contracted while the bankrupt was carrying on business in London; and they remained still due. He had given notice (by advertisement and otherwise), and had personally told his creditors, that he intended coming to Dublin; and they knew he had done so.

*Argument.* Mr. *Heron* appeared in support of the Irish adjudication. The bankrupt not having carried on business in London for six months immediately preceding his petition, the English adjudication cannot be sustained. He has carried on business here since November last, and has resided here. This Court, therefore, has exclusive jurisdiction over the case: *In re Rogers (a)*.

Mr. *Kernan*, in support of the English adjudication.

The main point in this case is, whether the 31st section of the Irish Act gives exclusive jurisdiction over this trader to the Irish Court? Now the trader had traded in England, and contracted debts there; and the mere fact of his having come to Ireland makes no difference. The act of bankruptcy was committed in England. Section 31 was passed for the purpose of preventing persons who were *bona fide* Irish merchants, but who went to England for the purpose of buying goods, from being made bankrupts while there for that purpose. The question is, to what period are we to refer the words "residing," &c.? Some words must be inserted to explain the Act. We contend the Act must mean the residence of the trader at the time of contracting the debt. It cannot mean the time of filing the petition, for, in that case, a petition could not be filed against an absconding trader.—[LYNCH, J. A person who absconds does so from his place of residence, but it does not cease to be his "place of residence."]

Mr. *Heron*, in reply.

LYNCH, J.

*Judgment.* In this case I feel bound to disallow the cause shown against the

(a) 9 Ir. Chan. Rep. 150.

adjudication in this Court on the 15th inst. The question of domicile is always the first thing to be tried in the Court in which the petition is presented; and the law is quite clear that, if his domicile be exclusively in Ireland, I have an exclusive jurisdiction over him. I have no power to add any words to the statute. I find it clear on the evidence, that this trader's case falls within the words of section 31. As to the argument of Counsel for the assignees in England, that we should interpret the Act as if it said residing or carrying on business exclusively in Ireland "*at the time of contracting the debt*," that would be to make a total change in the Act, and the most extraordinary consequences would follow as to the traders over whom this Court would have exclusive jurisdiction; for, in that case, if a trader, thirty years ago, contracted a debt in Ireland, and went immediately afterwards to England, and traded there ever since, I would, on account of the debt contracted in Ireland, have exclusive jurisdiction to make him a bankrupt. It is quite clear that, at the time this trader was brought before me, he resided and carried on trade exclusively in Ireland. There is no doubt on this point; he did so *bona fide*. He had deliberately removed his business and his family from London to Dublin, and he had given all his creditors notice of this. I cannot help saying that this case has been rendered very unsatisfactory by the manner in which it was brought before the Court in London. The adjudication there was certainly obtained from a Court which was left in complete ignorance of the real state of the facts. I now hold that the English Court had no jurisdiction in this case to adjudicate the trader bankrupt. That adjudication was obtained by a suppression of the facts which, I must hold, were shown to the gentlemen who sought, in the English Court, to make this trader a bankrupt; and yet I have an affidavit before me, sworn by the petitioning creditor in England, stating that for six months previous to the petition this trader carried on business in London. I think it a matter of duty that this case should be brought before the English Court. I disallow the cause shown; the costs to be paid out of the estate, and the usual warrant to issue to the messenger of this Court.

1861.  
*Bankcy., &c.*  
*In re*  
SANDERSON.  

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*Judgment.*



1859.  
*Chancery.*

JOHN HOWARD JESSOP, SALLY FETHERSTON and  
OCTAVIA GREGORY, Petitioners.

(*In Chancery.*)

Dec. 6.

A testatrix, after many pecuniary and some specific bequests, proceeded, "The remainder of my property I leave to my sister S. F.;" then, after a few legacies, "I appoint my two sisters S. F. and O. G. my executrixes and residuary legatees of this my last will."—*Held*, that the gift of the remainder of her property to S. F. was not revoked, and that the appointment of S. F. and O. G., residuary legatees, only gave them any legacies which had lapsed.

THIS case came before the Court on a cause petition, by way of special case, presented under the 11th section of the Court of Chancery (Ireland) Regulation Act 1850, under the following circumstances:—

Maria Fetherston made her will on the 14th of February 1851, which, so far as material, was in the terms following:—"I give and bequeath to my brother Sir George Fetherston the £500, late currency, left to me by my father, on his estate; I also leave him the sum of £20. I leave and bequeath to my two nieces, Georgina and Caroline Fetherston, the sum of £1000 each, out of the funds, provided they are unmarried at my death; but should they be married, instead of £1000 each I only bequeath them £200 each. I leave and bequeath to my godson John Fetherston, and his heirs and assigns, my estate and interest in my three houses in Rathowen, for ever; I also leave him the sum of £50, and my large gold watch, left to me by my brother John Fetherston. I leave and bequeath to my two sisters, Catherine Jessop and Isabella Godley, the sum of £30." The will then gave a great number of small pecuniary legacies, which did not include any gift to Sally Fetherston, and then proceeded as follows:—"To my sister Isabella Godley I leave a further sum of £50, that she may dispose of as she thinks proper. The remainder of my property I leave to my sister Sally Fetherston. I give and bequeath my share of 9 Upper Fitzwilliam-street, together with my proportion of furniture, wine, &c., to my two sisters, Sally Fetherston and Octavia Gregory, their executors, administrators and assigns, as tenants in common, in equal shares. I leave my niece, Caroline Fetherston, my small gold

*Statement.*

watch, chain and seals. I leave Georgina my thick gold chain and the brooch the Dean of Kildare gave me; I further leave Georgina £10 to buy some ornament in remembrance of one who loved her dearly. To my two nieces, Kitty and Elizabeth Jessop, I leave my plate I may have purchased myself. I appoint my two sisters, Sally Fetherston and Octavia Gregory, my executrices and residuary legatees of this my last will and testament; should they require assistance, I appoint my nephew John Jessop as executor, with a further sum of £50."

Miss Fetherston died on the 27th of February 1851, and her will was proved by Mr. Jessop. Several of the legatees named in the will having died in the lifetime of the testatrix, their legacies, amounting to about £630, lapsed, and the testatrix died possessed of property considerably more than was required for the payment of her debts and legacies.

The petition in this matter was filed to obtain the opinion of the Court, whether Sally Fetherston was alone entitled to that part of the residuary estate of the testatrix which was not composed of, and did not include, lapsed legacies, or whether Sally Fetherston and Octavia Gregory were jointly entitled thereto? It appeared that, at the time of making the will, Sally Fetherston lived with the testatrix.

Dr. Radcliffe, with him Mr. Fetherston, for Miss Fetherston.

The general rule of Law, that, if there be two inconsistent gifts in a will, the last shall prevail, must be admitted; but if the two gifts can be reconciled, if it does not appear that they can only refer to the identical same property, they shall both be upheld: 2 *Wms.' Exors.*, p. 980. The rule in favour of preferring the latter of two dispositions is applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render every part of them operative: *Ship-pardson v. Tower* (a). The first gift is a clear and unequivocal expression of the intention to benefit Sally Fetherston; the other side must show the intention to revoke it; that *onus* is clearly

1859.  
*Chancery.*  
*In re*  
JESSOP AND  
OTHERS.  

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Statement.

*Argument.*

(a) 1 Y. & C., C. C., 459.

1859.  
*Chancery.*  
*In re*  
 JESSOP AND  
 OTHERS.  
 ———  
*Argument.*

cast upon them: *Randfield v. Randfield* (a); *Morrall v. Sutton* (b). *Windus v. Windus* (c) shows how limited a construction is to be put on the words "I appoint A residuary legatee." Reliance will be placed on *Hardwicke v. Douglas* (d); it is, however, a very different case, both as turning on a codicil. and as to the peculiar form of words used: the same is the case with respect to *Ulrich v. Lichfield* (e). The second residuary clause may be fully satisfied by treating it as a gift of lapsed legacies: *Sherratt v. Bentley* (f); *Co. Litt.*, p. 112 b; *Knaresborough v. Fitzpatrick* (g); *Mitford v. Wicken* (h); *Acheson v. Fair* (i); *Maddison v. Chapman* (k); *Browne's Trusts* (l); *Cooper v. Cooper* (m); *Langham v. Sanford* (n); *Briggs v. Penny* (o).

Mr. R. R. Warren and Mr. C. Todd, contra.

The rule is quite clear, that the last of two inconsistent bequests must prevail: *Ulrich v. Lichfield*; *Co. Litt.*, p. 112 b. There is no possibility of giving concurrent effect to these two; *Spooner's Trusts* (p); *Blachford v. Long* (q); *Hardwicke v. Douglas*.

The LORD CHANCELLOR.

Dec. 20.  
*Judgment.*

The petition in this case was filed for the purpose of obtaining the opinion of the Court upon the construction of the will of the late Maria Fetherston, with respect to a very short point arising upon two brief clauses in the will of that lady, which bears date the 14th of April 1851. It commences "I, Maria Fetherston, do make this my last will and testament;" then, after certain legacies, including £100 to her sister Octavia, there follows the first of the

(a) 4 Drew, 147; S. C., on appeal, 2 De G. & J. 57.

(b) 1 Phil. 533.

(c) 21 Beav. 373.

(d) 7 C. & F. 795.

(e) 2 Atk. 373.

(f) 2 M. & K. 149.

(g) 13 Ir. Eq. Rep. 338.

(h) 2 Ken., pt. 2, 61.

(i) 3 Dru. & W. 123.

(k) 4 K. & J. 709; S. C., on appeal, 5 Jur., N. S., 277.

(l) 1 K. & J. 529.

(m) Ibid. 665.

(n) 19 Ves. 640.

(o) 7 De G. & M. 525.

(p) 2 Sim., N. S., 129.

(q) 7 Ir. Chan. Rep. 87.

clauses upon which the difficulty has arisen, "the remainder of my property I leave to my sister Sally Fetherston." Sally Fetherston resided in the house with the testatrix. Her sister Octavia, or Mrs. Gregory, had been previously married, and then lived in her own house; £100 only was, in the first instance, given to Mrs. Gregory, as a legacy, and the residue was then given, in very clear and distinct terms, to Sally Fetherston, who, under the circumstances, may have been supposed to have been the main and peculiar object of the bounty of the testatrix. Upon these words no doubt could exist that Miss Fetherston would have taken the entire property of her sister, which had not been otherwise bequeathed. However the will did not stop there, but proceeded to give some specific legacies, and then went on as follows:—"I appoint my two sisters, Sally Fetherston and Octavia Gregory, my executrixes and residuary legatees of this my last will; and, should they require assistance, I appoint my nephew John Jessop as executor." The question which arises is, what is the effect of that last direction or appointment of two residuary legatees? Some of the legacies have lapsed, and with respect to them no question arises; it is conceded that these have fallen in for the benefit of the two residuary legatees; and the only question is, whether, under these words, the two are entitled to the general residuary property, or whether it is still covered by the former bequest of all the remainder to Sally Fetherston?

Now it must be remembered that all these directions are contained in a very short instrument, which, from the time when she begins by emphatically declaring it to be her last will, does not contain the least indication of intention to vary, by subsequent provisions, any of the arrangements made by it. It is, in fact, one will without any apparent intention to revoke or alter any part of it by any other. The presumption certainly is, that she would naturally have preferred the sister who lived with her; and as there is, in the first portion, a clear gift of all the property to Sally, it will be necessary to show that other words as clear have been used to displace that provision.

1859.  
*Chancery.*  
*In re*  
JESSOP AND  
OTHERS.  
*Judgment.*

1859.  
*Chancery.*  
*In re*  
 JESSOP AND  
 OTHERS.  
*Judgment.*

Reliance was placed on the case of *Spooner's Trusts* (a), as showing that an appointment of a residuary legatee would carry the whole residue of the property; and admittedly it has the effect which in *Easum v. Appleford* (b) is attributed to a residuary clause, that it passes a lapsed legacy; but there is nothing in *Spooner's Trusts* which governs the present case, the precise question in which seems now for the first time to have arisen. *Ulrich v. Lichfield* (c) was much pressed on behalf of Mrs. Gregory. That case was described by Lord Brougham, in *Sherratt v. Bentley* (d), as a case reported in a very slovenly way; but it is also reported in 2 *Purton Cooper, tempore Cott.*, p. 531, under the name of *Francis v. Ditchfield*, where it is stated from the *Jodrel M.SS.*, and in substance to the same effect as in the report in *Athin*. In that case the testatrix was seised of real and possessed of personal property; and by her will she devised all her real and personal estates to the two plaintiffs for life, as tenants in common, "one moiety of the rents and profits to be received by the one, the other moiety by the other: and in case of the death of Elizabeth Francis, the whole to Jacob Woolrich, and the heirs of his body, with remainders over." Then she gives some pecuniary legacies, which she charges "on the real estate before devised, in case her personal estate shall not be sufficient to pay them;" and goes on then, "All the rest and residue of my personal estate I give to the three daughters (defendants) of my uncle Leonard Collard;" and she made Susan Ditchfield executrix.

The great question which arose in that case, and which has subsequently become the subject of discussion in many other cases, was whether parol evidence was receivable, on the construction of the document. It was, however, rejected; and Lord Hardwicke then entered upon a discussion of the intention to be gathered from the will, and came to the conclusion that the plaintiffs took no part of the personal estate. That certainly was a very strong case, and was naturally relied on as an authority for Mrs. Gregory. It was, however, decided by Lord Hardwicke, on the ground of the apparent

(a) 2 Sim. N. S., 132.

(b) 5 M. & C. 61.

(c) 2 Atk. 372.

(d) 2 M. & K. 162.

intention, to effect a total alteration of the earlier devise; for he says:—"First; it is plain that the testatrix did not design the first bequest to take effect *in toto*, for every legacy given after is an alteration of it *pro tanto*; and she had it in contemplation that her personal estate might not be sufficient to satisfy those legacies; and, if so, it is plain that she designed this as a revocation *in toto*; for there might be a necessity to charge them even on the real estate." Thus he collects from the will itself an intention to revoke the first bequest: and though one may not very clearly appreciate, or completely agree with, the view taken by the Court, still it is plain that the words of the last clause were fully as clear as those of the first. The case is very different from the present. The second gift is, "all the rest and residue of my personal estate to the three daughters of my uncle Leonard Collard." Language could not be clearer; and thus there was a manifest conflict between the two bequests.

The question which has always arisen in this class of cases is, whether it must be taken that a revocation was meant, or whether any reasonable construction can be given, which will make the two conflicting clauses consistent? and, if any such construction can be given, so as to allow both parties to take, giving some interest to each, that construction must be adopted. Of this rule there are several examples; but here it is very difficult to act upon it; for Sally Fetherston would take the whole residue under the first clause, and one-half the residue under the second.

It is equally improbable that the testatrix intended to revoke the benefits which she had conferred on Sally Fetherston. She had given her, in the first instance, all her property, and had then taken out of that several unimportant matters; and then she constitutes her two sisters residuary legatees. It does not seem very probable that, at the end of a very few lines, she should so totally have changed her intention, and have given only one-half of the fund, which she had before given entirely to Sally Fetherston, and that diminishing it by the amount of the legacies. To bring me to that improbable conclusion there must, according to the well-established rules I have alluded to, be a second bequest irreconcilably inconsistent with the first; and it must be equally clear and precise.

1860.  
*Chancery.*  
*In re*  
 JESSOP AND  
 OTHERS.  
*Judgment.*

1859.  
*Chancery.*  
*In re*  
**JESSOP AND**  
**OTHERS.**  
*Judgment.*

Here then we have the second gift in the form of an appointment of residuary legatees. Now these words are very flexible; they have been considered in the cases of *Windus v. Windus* (a), *Langley v. Thomas* (b), and *Day v. Davoren* (c). In the last of those cases it was held that the appointment of persons to be residuary legatees did not give them a right to the personal property of the testator. With these decisions, illustrating the flexibility of these words, is it reasonable to give them the effect of revoking the strong and clear words in which the gift to Sally Fetherston is couched? There is a very strong case in support of the proposition that the first bequest was not revoked, reported in the notes taken by Lord Kenyon, though not published until long after the death of the Judge by whom it was decided—*Mitford v. Wicker* (d). In that case there had been a bequest of the testator's whole fortune, to be divided between the second son of his brother, the defendant, and the second son of his sister, S. Mitford; in case of no such second sons, he gave one moiety of the testator's fortune to the eldest son of his sister, in case he should be living at the time of his death, and the other half to his brother, the defendant; then, after several other legacies, he concluded with a residuary bequest to his brother, the defendant, whom he made executor. The precise terms of that bequest are not given, and it does not appear whether it was a clear express gift of the residue, or a mere appointment of a residuary legatee. The question there was, whether the subsequent residuary bequest displaced the prior gift of his whole fortune to the other persons? The case was much argued, and Counsel insisted that the whole fortune having been given in the first instance, there was nothing left for the residuary bequest to operate on, and that it was only intended to provide for lapsed legacies to operate on; but the Court held, that the words "whole fortune" left something still undisposed of, which might pass under the residuary clause, and accordingly held, that only that which was not disposed of by the first gift did pass under the general residuary bequest. There was another case

(a) 21 Beav. 373.

(b) 6 D., M. & Gor. 45.

(c) 12 Sim. 200.

(d) 2 Ken., pt. 2, 61.

referred to, *Hardwicke v. Douglas* (a), which arose not on a will, but on a codicil, and is, therefore, open to a much more probable construction in favour of the later disposition than if it were in a will, especially a will spoken of emphatically, like the present, as the last will of the testator. In that case the House of Lords held that the expressions used in the codicil did show an intention to give the entire residue. The language of Lord Cottenham in that case is very important, when he speaks of the practice in cases like this:—"It frequently happens that there is found such a residuary clause, and that, for greater caution, and to avoid the possibility of not having included some things, you find words which, though not altogether of a general residuary kind, are not intended to apply to an antecedent gift." In *Hardwicke v. Douglas* the indication of intention to revoke the prior bequest was held to be sufficient; but in this case the second residuary clause seems to have been introduced for some purpose such as that suggested by Lord Cottenham; and, looking to the whole will, I find a clear residuary bequest in favour of Sally Fetherston at first, and a few lines subsequently I find this second bequest, couched in terms of great flexibility. Nothing is suggested as likely to have caused an alteration in the intention of the testatrix. There is no indication of any change of feeling towards Miss Fetherston; and I cannot decide that the somewhat ambiguous expressions at the end are sufficient to take away the effect of the first clear residuary bequest.

(a) 7 Cl. & Fin. 795.

*General Hearing Book*, 25, f. 301.

1859.  
*Chancery.*  
*In re*  
 JESSOP AND  
 OTHERS.  
 Judgment.



1860.  
*Chancery.*

In re CROSBIE.

June 16.

C. having been found lunatic, by inquisition, obtained leave to traverse. The LORD CHANCELLOR directed one of the Masters of the Court to act as committee, and to oppose the traverse, which he did by the General Solicitor for Minors and Lunatics. The traverse was successful. —*Held*, that C. was not entitled to have the receiver discharged, without providing for the costs of the General Solicitor for Minors and Lunatics, incurred in his case.

THIS case came before the Court upon an application by Mr. Crosbie, against whom a commission of lunacy had been issued, to have the receiver appointed in the lunacy matter discharged from his property. In the first instance a verdict of lunacy had been found against Mr. Crosbie; he, however, obtained leave to traverse this finding; and there being some difficulty about providing for the future conduct of the proceedings, the LORD CHANCELLOR had directed Acheson Lyle, Esq., one of the Masters of the Court, to be committee, had directed him to oppose the traverse, and had ordered certain costs, including the costs of opposing the traverse, to be paid out of the lunatic's estate, to the General Solicitor for Minors and Lunatics, who acted for Mr. Lyle in this matter. On the traverse the jury returned a verdict establishing Mr. Crosbie's sanity; and the present application for the discharge of the receiver was opposed by the General Solicitor for Minors and Lunatics, who claimed a right to have the receiver continued until the amount payable to him under the different orders of the Court had been satisfied.

*Statement.*

Mr. Sullivan, Mr. Thomas Harris and Mr. Dowse, for the petition.

*Argument.*

After the success of the traverse the Court has no jurisdiction over the property. The traverser is entitled to be let back into possession of his property. The utmost extent to which the 6 G. 4 can be carried is, that acts done by the order of the Court, previous to the success of the traverse, shall not be undone, and that money paid under such orders shall not be recovered back; but the Court has no further jurisdiction to deal with the traverser's property: *Loveday's case* (a); *In re Cumming* (b).

(a) 1 D., M. & G. 980.

(b) *Ibid*, 537.

Mr. *R. Armstrong*, Mr. *Joshua Clarke* and Mr. *Graydon*, contra.

The Court has jurisdiction to carry out orders previously made ; nothing farther is to be done ; no new liability can be imposed on the estate ; but the mere success of the traverse is not to render the previous orders ineffectual, and to impose on the officers of the Court serious responsibility for obeying the orders of the Court.

1860.  
*Chancery.*  
*In re*  
*CROSBIE.*  
*Argument.*

The LORD CHANCELLOR.

The question raised in this case is one of very general bearing, and I can hardly say that my mind is quite made up upon it ; but as it now appears to me, I do not think that the present application can be maintained, to the full extent sought by it ; for I think that I should introduce an erroneous principle in the administration of the estates of lunatics, and that much confusion would be caused, if I were to hold that I had not the power of continuing the receiver, so far as necessary to fulfil the orders previously made in the matter.

*Judgment.*

The substantial question here is, whether orders made in this matter for the payment of money, and which, for the purpose of payment, only awaited the coming into Court of funds to the credit of the matter, are to be forthwith frustrated, on the success of a traverse to the inquisition ? So far as *Loveday's case* (a) decides, that after a successful traverse no further orders for the payment of money are to be made, I quite concur in it ; but the question here respects the application of the funds in fulfilment of orders already made.

It is true that, with respect to the costs, they have not yet been taxed, and their taxation will be necessary ; but the order for payment of them has already substantially been made, and the taxation will take place in pursuance of that order ; so that the liability has been fastened on the fund, and it is only the amount which remains to be ascertained. With respect to the balance payable to Dr. Gregory, I think the same principles applicable to it.

It must be observed that there is a difference between the English and the Irish practice with regard to the estates of lunatics.

(a) 1 D., M. & G. 280.

1860.  
*Chancery.*  
*In re*  
 CROSBIE.  
 Judgment.

In this country there is not any separate grant made of the estates of lunatics, as there is in England, by the Lord Chancellor. We have, however, here that which is tantamount to such a grant, the appointment of a receiver over the lunatic's estate, to receive its produce, to protect it from injury, and to discharge its liabilities. Now there are certain expenses incidental to this appointment, and which necessarily flow from it, and there must be some provision for repayment to the Court and its officers of the expenses thus incurred; for instance the receiver's fees, the costs of passing his account and of his appointment, and other matters incidental to his position. I am now talking of matters apart from the 6 G. 4, c. 53; but when we come to consider the terms of that Act, it is very difficult to say that the mere success of a traverse would, by itself, nullify all the orders, and displace everything which had been done, so that, though any person whose claim had been actually paid would be undoubtedly entitled to retain the amount, all orders which had not actually been paid should, in effect, be discharged, and the sums directed by them to be paid should be lost. Of course, I now speak only of costs incurred by the direction and under the orders of the Court itself. I do not speak of costs incurred by other persons, on their own responsibility; but where the Court has directed anything to be done, it seems to me to have acquired certain powers during the pendency of the matter, and even after the success of the traverse, to retain the power of acting on the orders theretofore made.

Here there is an order charging the estate of the lunatic with certain sums of money, which the Court, under the Act of Parliament, had full power to make, at the time when they were made. A charge was thus created by the Court, when in possession of the estate, under the operation of the statute; and it seems to me a very serious thing to say, looking to the provisions of the 6 G. 4, c. 53, that though the Court has power to charge the estate with expenditure incurred, or to be incurred under its orders, yet that such charge is to fall to the ground immediately on a traverse being successful. By that statute it is enacted that the Court may, notwithstanding any petition or order which may be depending relative

to a traverse of an inquisition, make "such orders relative to the custody and commitment of the person or persons, and the custody, management and application of the estates and effects of any person or persons who shall or may have been found lunatic, idiot or of unsound mind, by any such inquisition or inquisitions, as he or they shall think necessary or proper;" and these words are not followed by anything to say that they are to become ineffectual immediately on the success of a traverse. All that is necessary to found the power of the Court is, that the party should have been found lunatic by inquisition. If that be so, the Court has jurisdiction, up to the very moment of the success of the traverse, to make all such orders as it shall deem necessary and proper; so that the Court has only to see that there is a person found to be a lunatic, and that there is an application of his estate for purposes necessary and proper; and the Court, seeing that, has power to charge the estate for such purposes, notwithstanding the pendency of a traverse.

1860.  
*Chancery.*  
*In re*  
 CROSSIE.  
 Judgment.

It appears to me that it would be a very strong thing indeed to take the fund from the receiver, and to discharge him without making any provision for the payment of the costs incurred by the orders of the Court. *Loveday's case* (a) is quite different from the present. The Court was not there possessed of any fund, inasmuch as there had been no grant made to the committee, and the costs had not been incurred by the express direction of the Court, as they have been here. *In re Cumming* (b) is an authority for the right of the Court to retain the receiver, for the Court there declined to stay the order for executing the grant, and appointing committees of the estate pending the traverse, and they made the order for the appointment plainly with the intention that the expense should be defrayed in some way, and not that the estate should be given back discharged from the expenses incurred by order of the Court. That case came before Lord St. Leonards and the Lords Justices, on a petition by Mrs. Cumming for leave to traverse the inquisition, and that, in the meantime, all proceedings should be stayed. The Court declared Mrs. Cumming entitled to traverse the commission, but,

(a) 1 De G., M'N. & G. 280.

(b) 1 De G., M'N. & G. 537.

1860.  
*Chancery.*  
*In re*  
 CROSBIE.  


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*Judgment.*

notwithstanding that, made the order given in 1 *De G., M'N. & G.*, p. 563; they made the grant of the estate, and gave her the full income of it, without keeping any in the hands of the Court; plainly implying that they had full power to do so. That is the only case which I can find upon the subject, save *Loveday's case*; and what I shall do is, direct the receiver to pass an account, and remove him from the half-pay and the lands of the petitioner, but not from the residue of his property.

*Order.*

It is ordered that the receiver do proceed to pass an account; and it is further ordered that he be, and he is, hereby discharged from over the half-pay and the lands of the said petitioner, on the terms of the said petitioner appearing before a clergyman and giving a certificate of existence, as required for the purpose of the receiver's obtaining payment of the Government annuity; and contingently on the Court being of opinion that it has jurisdiction to order payment thereof, his Lordship is pleased to declare the said T. H. and the General Solicitor for Minors and Lunatics entitled to the sum of £5 each, as and for their costs of appearing on the motion of the 9th of June 1860; and a like sum of £5 each, as and for their costs of appearing on the motion of this day; and it is further ordered, that the General Solicitor for Minors and Lunatics, as solicitor for the committee, do proceed to tax his costs between solicitor and his client in this matter. Let the receiver have his costs of the motion.

*Clerk of Custodies Book, 11, f. 382.*

1861.  
 Jan. 12.

On this day the application for the discharge of the receiver was renewed, the petitioner having undertaken to pay the costs of the General Receiver for Minors and Lunatics; and an order was made, on consent, to discharge the receiver; he to pay the balance in his hands to the Solicitor for Minors and Lunatics, on account of his costs as solicitor for A. Lyle, Esq., the committee of the estate of petitioner.

1860.  
Rolls.

FITZGERALD v. O'CONNELL.

(In the Rolls.)

June 8.  
1861.  
Jan. 21.

MARGARET WHITE, by her will, bearing date the 22nd of November 1814, devised several annuities to charities in the city of Limerick, and other annuities to individuals. Some of the annuities were to continue for ever, and others of them were devised for a specified number of years; and she directed that the several annuities were only to be a lien upon, and charged and chargeable on, her yearly income by lands and tenements, real, freehold and chattel real, but not upon any other personal estate in money, securities for money, or other personal effects and property; and that if her yearly income, by lands and tenements, real, freehold and chattel real, should fall short of paying the several annuities, &c., the deficiency should equally and proportionably be upon all such annuities or yearly sums, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be vested upon her personal estate in money, securities or effects. After giving some further legacies, the testatrix devised and bequeathed the rest, residue and remainder of her property, real, freehold and personal, and of every other kind and nature whatsoever, which she had previously vested in her trustees, after satisfying and discharging said several annuities, legacies and charges, to Francis Fitzgerald, Esq., his heirs, executors and administrators.

On the 16th of May 1823, the original bill was filed by the residuary devisee, against the trustees and executors of the will, praying that the trusts of it should be carried into execution. A receiver was appointed, by an order of the 25th of June 1823, and a decree

A testatrix devised several annuities, which she directed only to be a lien upon and charged on the yearly income of her lands, real, freehold and chattel real, but not upon any other personal estate; and she directed that if the yearly income of her lands should fall short of paying the annuities, the deficiency should equally and proportionably be upon all such annuities, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be vested upon her personal estate; and she devised the residue of her property, real and personal, after satisfying and discharging said annuities,

&c. The income of the lands was insufficient to pay the entire of the annuities.—*Held*, that the annuities, being charged on the income of the lands only, were, for each year, satisfied by payment of a proportionable share, and that the arrears were not charged on the future rents.

1860.  
*Rolls.*  
 FITZGERALD  
*v.*  
 O'CONNELL.

*Statement.*

to account was pronounced, under which the Master made a report, by which he found that the rents were not sufficient to discharge the annuities and charges created by the will; and he found a deficiency of £117. 7s. 11d. to be proportionably abated by the said annuitants, for the year ending the 1st of May 1823; and a deficiency of £381. 15s. 4d. to be proportionably abated for the year ending the 1st of May 1824. The report was confirmed by a decree of the 25th of February 1825. Successive receivers continued in receipt of the rents of the lands, which were, for a considerable time insufficient to discharge the annuities; but they had lately been let at a greatly increased rent. A considerable arrear remained unpaid on foot of the annuities, and, on the 8th of June 1859, an order was obtained from the MASTER OF THE ROLLS, whereby it was referred to the Master to inquire and report whether there was any and what sum due and in arrear on foot of the several annuities. The Master made his report on the 15th of May 1860, and thereby found that there was no sum due or in arrear on foot of the said annuities up to the 1st of November 1859, being the gale-day prior to the making of his report.

The trustees of the charities now moved, on objection to the report, that the Master should have found that there were due to the several charities certain specified sums on foot of the several annuities.

*Argument.*

Mr. *Pilkington* and Mr. *Lawless*, in support of the appeal, contended that, according to the true construction of the will, the several annuities ought to abate rateably, during the period when the rents were insufficient to discharge the entire amount of the annuities. The residuary devisee could take nothing until "after payment and satisfaction of the annuities." The charge directing an abatement of the annuities had the effect of exonerating the personal estate only, and not the real estate, from the payment of the deficiency: *Attorney-General v. Poulden* (a); *Baker v. Baker* (b).

(a) 3 Hare, 555.

(b) 6 H. L. Cas. 681.

Mr. *Sullivan* and Mr. *Thomas Graydon*, in support of the Master's report, contended that, according to the true construction of the will, the annuities of each year were only payable out of the rents of the same year, and, in case of a deficiency, were to abate proportionably; and that the deficiency was not be paid out of the future rents. They also contended that the question was determined by the decree of the 25th of February 1825: *Stelfox v. Sugden* (a); *Baker v. Baker* (b); *Farmer v. Mills* (c); *Scott v. Salmond* (d); *Wright v. Callender* (e); *Casamajor v. Pearson* (f); *Marquis of Bute v. Conyngham* (g); *Darbois v. Richards* (h).

1860.  
Rolls.  
FITZGERALD  
v.  
O'CONNELL.  
Argument.

THE MASTER OF THE ROLLS.

A motion has been made in this cause, on behalf of the Governors of St. John's Fever Hospital, in the city of Limerick, the Directors and Managers of the four several Roman Catholic Schools of St. Michael, St. Mary, St. Minchin and St. John's parishes, in the said city, and the Governors of the Lying-in-Hospital, in the said city, that the report of William Brooke, Esq., bearing date the 15th of May 1860, may be varied. The Master has, by his report, found that there is no sum due and in arrear on foot of the annuities devised to the said several charities by the will of Margaret White, up to and for the 1st of November 1859; whereas it is contended, on behalf of the said charitable institutions, that there is the arrear in the notice of motion mentioned due to the each of them respectively, up to and for the said 1st of November 1859. The question whether any arrear is due depends on the construction to be put on the said will.

1861.  
Jan. 21.  
Judgment.

The will bears date the 22nd of November 1814. The testatrix Margaret White, by the said will, devised and bequeathed to Daniel O'Connell, Esq., and the other trustees therein named, all her property, real and personal, upon the trusts therein mentioned; and, after a direction that the trustees should apply the rents and profits

(a) 1 John. 234.

(b) 6 H. L. Cas. 631.

(c) 4 Russ. 86.

(d) 1 M. & K. 363.

(e) 2 De G., M. & G. 652.

(f) 8 Cl. & F. 69.

(g) 2 Russ. 427.

(h) 14 Sim. 537.



1861.  
*Rolls.*  
 FITZGERALD  
*v.*  
 O'CONNELL.  
 Judgment.

of a certain part of her real estate, on the trusts therein mentioned, and that they should pay a certain annuity to the testatrix's aunt, Honora Kirby, out of the rest, residue and remainder of her property, the will proceeds as follows:—"And upon this further trust and confidence, that my said trustees, and the survivors or survivor of them, and the heirs, executors and administrators and assigns of such survivor, shall pay out of the rest, residue and remainder of my said property the following yearly sums, for the following purposes; namely, the sum of £20 a-year for ever to the Female Roman Catholic Charity School in Denmark-street, in the county of the city of Limerick, for the maintenance and use of the girls there admitted, as the overseers or directors shall think best to apply it; and also the sum of £20 a-year for ever, for the like purpose, to the Charity Female School at the Convent near Peter-cell, in the city of Limerick, being a Roman Catholic Charity School; and also the sum of £20 a-year, for ever, for the like purpose, to the Roman Catholic Male Charity School of the parish of St. John; and also the sum of £20 a-year, for ever, for the like purpose, to the Roman Catholic Male Charity School of St. Mary's, both said parishes being in Limerick, or county of the city thereof; and my will is, that if any of said charity schools are discontinued, the annuity so payable to such school shall be applied towards the benefit of the remaining schools, in manner aforesaid: and upon this further trust and confidence, that my said trustees, and the survivors or survivor of them, and the heirs, executors, administrators and assigns of such survivor, shall also pay out of my said property, towards the support of the Fever Hospital of St. John's, in the city of Limerick, the sum of £50 a-year, for fifty years from the day of my decease; and also the sum of £10 a-year towards the support of the Lying-in-Hospital, at Boherboy, in the suburbs of Limerick, for fifty years from the day of my decease; and also the sum of £40 a-year to the House of Industry, on the North Strand, Limerick, for twenty-one years from the day of my decease; and also the sum of £5 a-year to the Physician's Dispensary, for twenty-years from the day of my decease; and also do pay to my domestic Honora Grady the sum of £22. 15s. a-year, for the term of her natural life; hereby

giving power and authority unto her, the said Honora Grady, by will or deed, to continue such annuity of twenty guineas per annum, for the term of twenty years from the day of the decease of the said Honora Grady, in favour of such person or persons as, by will or deed, she may direct and appoint; and also to pay towards the support of the poor of the parishes of St. Michael, St. Mary, St. John and St. Minchin's, Limerick, unto each parish the yearly sum of £30, for twenty years from the day of my decease, to be disposed of amongst the said poor, at the discretion of my said trustees; and also the sum of £50 a-year for thirty-three years from the day of my decease, unto the said Rev. Patrick Hogan, to be applied by him, his executors, administrators or assigns, for the payment of the rent and other expenses connected with the preservation of the chapel of St. Michael's parish, Limerick."

The testatrix then bequeathed several pecuniary legacies to the legatees in the will mentioned, and directed that her trustees and executors should lay out the sum of £1000 in the establishment of a Magdalen Asylum in the city of Limerick, or the suburbs thereof; and then the will proceeds thus:—"And in further aid and support of such intended Asylum my will is, that, upon the decease of my said aunt, Honora Kirby, a yearly sum of £100 sterling per annum shall be applied out of my property every year, for the space of twenty years, to be computed and to commence from the decease of said Honora Kirby, and to go towards the maintenance and support of said intended Asylum;" . . . . . and then follows this clause, on the construction of which the question arises:—"And further, I do, by this my will, declare my intention and meaning to be, that the foregoing several annuities or rentcharges (charitable or otherwise), and all and every annuity or rentcharge granted by this my last will and testament, are only to be a lien upon, and charged and chargeable on, my yearly income by lands and tenements, real, freehold, and chattel real, but not upon any other personal estate in money, securities for money, or other personal effects and property; and further, my will is, that if my yearly income by lands and tenements, real, freehold and chattel real, shall fall short of paying the several annuities, yearly sums

1861.  
*Rolls.*  
FITZGERALD  
v.  
O'CONNELL.  
*Judgment.*

1861.  
*Rolls.*  
 —————  
 FITZGERALD  
 v.  
 O'CONNELL.  
 —————  
*Judgment.*

or rentcharges aforesaid, and any other granted by this my will, that such deficiency shall equally and proportionably be upon all such annuities or yearly sums, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be vested upon my personal estate in money, securities or effects."

The testatrix then bequeathed some other legacies; and the will contains this residuary clause:—"And as to the rest, residue and remainder of my property, real, freehold and personal, and of every other kind and nature whatsoever, so as aforesaid vested in my said trustees, after satisfying and discharging said several annuities, legacies and charges, both charitable and otherwise, my will is, that such residue and remainder shall go unto, and I hereby devise and bequeath the same unto, said Francis Fitzgerald, of Adelphi, in the county of Clare, his heirs, executors and administrators, according to the true intent and meaning of this my will."

The question which arises on the construction of the will (unless it be concluded by the report and decree in this cause, to which I shall hereafter advert) is, whether the appellants, who, if I understand the schedule to the report, have been paid the rateable proportion of the annual rents received out of the lands on which their annuities are a charge, are entitled to be paid the deficiency in the amount of their respective annuities, out of surplus rents which possibly may be received at some future time? The Court, so far as I understand the case, is called on to decide a question as to what is the construction to be put on the will, in the event of a state of facts which may never arise.

The observations of Lord Wensleydale, in *Baker v. Baker* (a), establish, I apprehend, that the residuary clause in the present case in no way extends the meaning of the clause on which the question arises. Lord Wensleydale, in the preceding page, adverts to what his Lordship laid down in *Gray v. Pearson* (b). Now if, in the present case, the "grammatical and ordinary sense of the words is to be adhered to," and if the adhering to such grammatical and ordinary construction in this case will not lead to any "absurdity

(a) 6 H. of L. Cas. 631.

(b) 6 H. of L. Cas. 106.

or some repugnancy or inconsistency with the rest of the instrument," there does not appear to be much, if any, doubt in the case. The clause in question is in these words.—[The MASTER OF THE ROLLS read the clause, *ante*, p. 441].

Thus the annuities were "only" to be a lien upon testator's "yearly income" by lands and tenements, &c.; and if the "yearly income" by lands and tenements, &c., should fall short of paying the annuities, it was the testator's wish that "such deficiency" should "equally and proportionably be on all such annuities or yearly sums, each to receive according to the magnitude of such annuity, in proportion thereto." Now if nothing had been said in the will exonerating the personal estate, I cannot see that there could be any reasonable doubt that the Master was right in holding that no arrear was due to the appellants, between whom and the other annuitants, as I understand the case, the annual rents were distributed proportionably. But it is said that the language of the part of the clause exonerating the personal estate from the deficiency shows that the future surplus rents of the real estate should be applied to make up such deficiency. I do not think that the language exonerating the personal estate would lead to any "absurdity, repugnancy or inconsistency," in the event of the Court construing the portion of the clause which relates to the real estate according to the grammatical and ordinary sense of the words. According to the grammatical and ordinary sense of the words, so far as the annuities are charged on the real estate, the annuities were to be paid in full, if "the annual rents" were sufficient; but they were "only" to be paid out of the "annual rents;" and if the annual rents were insufficient, each annuity was for that year to abate proportionably; and the annuity for a particular year was, in my opinion, paid up, when the proportionable part of the annual rents for that year was paid to the annuitant.

It is to be observed that some of the annuities devised by the will are terminable; for example, there are two annuities devised for fifty years, two for twenty-one years, two for twenty years, and one for life. The will bears date in 1814. As I understand the

1861.  
Rolls.  
FITZGERALD  
v.  
O'CONNELL.  
Judgment.

1861.  
*Rolls.*  
 FITZGERALD  
*v.*  
 O'CONNELL.  
 ———  
*Judgment.*

schedule to the Master's report, the rents received have never been sufficient to pay the annuities in full; and the appeal is brought on the assumption that at some future period there possibly may be a surplus rental to be applied to pay off the alleged arrears.

It was not stated by Counsel when the testatrix died; but as the probate was granted on the 8th of February 1815, she must have died before that day. Thus the two annuities for twenty-one years, and the two annuities for twenty years, devised by the will, have determined, and the annuities for fifty years will soon determine. Are the arrears which are due on the annuities which have determined, and will determine, to be paid twenty years hence, or at the end of any other number of years after the termination of the annuities? Is the Statute of Limitations to be a bar at the end of six years, although there was no fund to pay the alleged arrears during the six years? The difficulties which would arise from not adhering to the grammatical language of the will would be numerous.

I am of opinion, on the whole, that the construction sought to be put on the will by the appellants cannot be sustained.

If this be so, it is not necessary to consider the remaining question as to the effect of the decree of the 25th of February 1825, and the report therein mentioned. It is said that the Master considered the question concluded by that decree. I entertain doubt on that point, but it is not necessary to decide it, if the construction which I put on the will be correct. The motion will be refused with costs.

This case was argued in Trinity Term; but the attested copy of the Master's report was not in Court, but only the draft report, on which I refused to act. The report was not sent to the Court until the last Sittings. It is impossible for the Court to decide cases unless on attested copies of the documents.

1861.  
Rolls.

## TOBIN v. REDMOND.

Jan. 15.

PARSONS FRAYNE, being seised for lives renewable for ever of the lands of Ballydicken, in the county of Wexford, demised thirty-three acres of the said lands; by a lease of the 25th of March 1803, to Richard Phelan and his heirs, for three lives, reserving a rent of £70, with power of distress. Richard Phelan died in 1809, intestate, whereupon the interest in the lease became vested in his eldest brother, Matthias Phelan, as his heir-at-law. Parsons Frayne agreed to purchase the interest in the lease, for a perpetual annuity of £20 a-year; and, to carry out the agreement, Matthias Phelan, by a lease, bearing date the 6th of November 1812, demised the thirty-three acres to Robert Phelan, the father of Richard and Matthias, for the same lives as those in the lease of the 25th of March 1803, reserving a rent of £90, with power of distress, in trust for Parsons Frayne and his heirs. Parsons Frayne became insolvent in 1817, and died on the 6th of August 1820, leaving Waller S. Frayne his heir. Robert Phelan died intestate, leaving Matthias Phelan his heir. A bill was filed by a creditor of Parsons Frayne, against his assignee and heir-at-law, in the Court of Exchequer; and the lands of Ballydicken having been sold under a decree of that Court to the respondent, John Edward Redmond, they were conveyed to him on the 27th of June 1834. The covenant against incumbrances excepted an annuity of £18. 9s. 3 $\frac{1}{4}$ d., payable out of the said lands, which annuity was admitted to be a profit-rent of £20 a-year, Irish, reserved by the lease of the 6th of November 1812. A bill was filed by Matthias Phelan against the respondent, in 1839, to recover the arrears of the £20 a-year, which stated the agreement under which the lease of the 6th of November 1812 was executed; and a decree *pro confesso* was pronounced on the 11th of February 1840. The statement in the bill, and the decree *pro confesso*, were the only evidence of the agreement.

A demised certain lands for lives renewable for ever, at £70 a-year. A, afterwards, agreed to purchase the lessee's interest, then vested in B, in consideration of a perpetual rentcharge of £20 a-year; and, to carry out the contract, B demised the lands for the same lives, renewable for ever, at a rent of £90 a-year, to C, in trust for A. C died; whereupon the interest in the latter lease became vested in B, as C's heir-at-law.—Held, that a suit could be maintained by B for a receiver to recover the arrears of the profit-rent of £20, there being no remedy for it at Law.

Statement.

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*Statement.*

Matthias Phelan died on the 22nd of October 1856, having devised all his landed property (except a specified part of it) to the petitioners.

The petition in this matter prayed for a receiver to receive the arrears of the rentcharge of £20 a-year; and the matter having been referred to Master Brooke, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850, he, by a decretal order of the 6th of August 1860, declared the petitioners entitled to a perpetual annuity of £20 a-year, charged on the thirty-three acres of the lands of Ballydicken, and referred it to the Receiver-master to appoint a receiver to collect the sum of £129. 4s. 9d., which he found to be due on foot of the said annuity. From that order the respondents appealed. After the hearing of the appeal motion, an affidavit was made, by which it appeared that one of the *cestuis que vie* of the leases of 1803 and 1812 was still alive.

*Argument.*

Mr. Serjeant *Sullivan* and Mr. *H. Barry*, in support of the appeal, argued that the annuity or profit-rent of £20 a-year could have no longer duration than the yearly rent of £90 reserved by the lease of the 6th of November 1812. That the right to recover the rent of £90 a-year was a legal right: *Brady v. Fitzgerald* (a); *Cremen v. Hawkes* (b); and Parsons Frayne was not liable to the payment thereof, as an equitable debt due by him to Matthias Phelan. At Common Law, the lease of the 6th of November 1812 operated as an assignment of the interest in the lease of the 25th of March 1803; and that interest having descended, on the death of Robert Phelan, to Matthias Phelan, the rent of £90 a-year was extinguished at Law; and there was no equity to prevent its extinction in the view of this Court. But, if it was not extinguished, the equitable right was commensurate with the legal right for which it was substituted, and which continued only during the lives of the lease of the 6th of November 1812: *Mitf. on Pl.*, p. 134. The relation between the parties was that of landlord and tenant, which was a legal and not an equitable relation: *Cox v. Bishop* (c); and one

(a) 11 Ir. Eq. Rep. 55.

(b) 8 Ir. Eq. Rep. 153, 503.

(c) 26 Law Jour. 389.

which the Court would not enforce indirectly: *Harrison v. Duignan* (a). The respondent was only liable to the same extent as Parsons Frayne. Evidence was not admissible of the contract on which the lease of 1812 was founded; and, if it was, there was no evidence of it except the statements in the bill on which the decree *pro confesso* was obtained. However conclusive that statement might be in that suit, it was not evidence in this: *Hamilton v. Haughton* (b).

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Argument.

The *Solicitor-General* and Mr. Tandy, contra.

The substance of the transaction of 1812 was a contract for the purchase of the interest in the lease of 1803, in consideration of a perpetual annuity of £20 a-year. The respondent is estopped by the decree *pro confesso* from denying that contract; and the Court will presume the execution of the deed necessary to carry it out: *Hillary v. Waller* (c); *The Mayor of Kingston-upon-Hull v. Horner* (d). The legal estate in the lease of the 6th of November 1812 having become vested in Matthias Phelan, he could not recover the rent at Law; therefore, the principle of the decisions of *Cremen v. Hawkes* (e) and *Brady v. Fitzgerald* (f) does not apply.

THE MASTER OF THE ROLLS.

A motion has been made in this case, by way of appeal from the decretal order of Master Brooke, signed the 6th of August 1860. The petition was for the recovery of the arrears of a certain annuity or rentcharge of £20 a-year, late currency, in the petition mentioned; and the case was referred to the Master, under the 15th section of the statute. The Master, by his order of the 6th of August 1860, declared the said petitioners entitled to a perpetual annuity of £20, late currency, in the petition mentioned; and that the same was well charged upon the lands and hereditaments thereafter mentioned; and it was by the said order further declared that the said petitioners were entitled, on foot of the said annuity,

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Judgment.

(a) 2 Dr. & War. 294.  
(c) 12 Ves. 239.  
(e) *Ubi supra*.

(b) 2 Bli. 169.  
(d) Cowp. 102.  
(f) *Ubi supra*.



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*Judgment.*

to the sum of £129. 4s. 9d., the particulars of which are set forth in the second schedule to the said order; and it was further declared that the petitioners were entitled to the accruing gales of the said annuity, from the 25th of March 1860, and to the costs incurred in this matter, when taxed; and it was referred to the Receiver-master to appoint a receiver over the lands thereafter mentioned, that is to say, that part of the lands of Ballydickén, containing thirty-three acres, Irish plantation measure, situate in the county of Wexford, &c., &c.; and it was further ordered that the receiver should apply the funds in his hands from time to time in payment of the said arrears, accruing gales and costs. The notice of appeal seeks that the Master's order may be set aside, and the petition dismissed with costs.

The facts of the case appear to be as follow:—Parsons Frayne, being seised of the lands of Ballydicken, for three lives renewable for ever, demised the thirty-three acres in the Master's order mentioned, by indenture, dated the 25th of March 1803, to Richard Phelan, for the same three lives, with covenant for perpetual renewal, at the rent of £70 a-year, late currency.

Richard Phelan died intestate, and his interest under the said indenture of 1803 became vested in his eldest brother and heir-at-law, Matthias Phelan, in some of the documents called Matthew Phelan. Parsons Frayne agreed, in the year 1812, to purchase the interest of Matthew Phelan, and, in consideration of the said purchase, to grant the said Matthias Phelan a perpetual annuity of £20 a-year, late currency. The mode in which this agreement was to be carried out was this:—Matthias Phelan was to demise to Robert Phelan the said thirty-three acres, for three lives renewable for ever, at a rent of £90 a-year, the said Robert Phelan, who was the father of Matthias Phelan, being a trustee for Parsons Frayne.

A lease, bearing date the 6th of November 1812, was accordingly made by the said Matthias Phelan to the said Robert Phelan, of the said thirty-three acres, for the said term and at the said rent. The lives in the lease of 1812 were the same as those in the lease of 1803. Thus Parsons Frayne, as *quasi* landlord of Matthias Phelan, was entitled to receive from him £70 a-year, late currency, reserved

by the lease of 1803; and Parsons Frayne, as *cestui que trust* of the lease of the 6th of November 1812, was bound to pay the £90 a-year to Matthias Phelan; and the result was that Parsons Frayne, deducting the £70, late currency, from the £90, late currency, was bound to pay £20 a-year, late currency, to Matthias Phelan; and, accordingly, the said Parsons Frayne continued to do so until his discharge as an insolvent debtor in 1817; and in his schedule he stated the £20 a-year to be an annuity or rentcharge for ever, issuing out of the said lands.

Parsons Frayne died on the 6th of August 1820, leaving a widow and Waller S. Frayne, his heir-at-law, him surviving. On the 9th of May 1823, a bill was filed by Thomas Sparrow and another, as creditors of Parsons Frayne, against John Cooper, the assignee of Parsons Frayne, under the Insolvent Act, and against Waller S. Frayne and others; and the entire of the lands of Ballydicken, including the said thirty-three acres, were sold under the decree, to the respondent John Edward Redmond, on the 27th of June 1834.

Robert Phelan, the lessee, or *quasi* lessee in the indenture of the 6th of November 1812, in trust for Parsons Frayne, died intestate, many years ago, and Matthias Phelan was his heir-at-law.

The effect of this, at Law was, that Matthias Phelan, who was liable to pay the £70 a-year, late currency, under the lease of 1803, to Parsons Frayne or his assigns, was entitled, under the indenture of the 6th of November 1812, to receive from himself, as heir-at-law of Robert Phelan, the £90 a-year, late currency, the legal title of his father Robert Phelan having descended on him; but as Robert Phelan was trustee for Parsons Frayne, Matthias Phelan was entitled, in Equity, to receive out of the thirty-three acres £20 a-year, late currency, being the difference between the £70 a-year and the £90 a-year.

There is no evidence to show that the lives in the indentures of 1803 and 1812 are dead, and it has been stated that one of the lives is in being. The presumption is in favour of life: *Wilson v. Hodges (a)*; and the petitioners do not seek to file any affidavit to show that the lives have fallen; and this being so, I must assume

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(a) 2 East, 312.

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that all the lives have not fallen.\* The £20 a-year, late currency, is, therefore, I apprehend, still payable. Whether it will cease when the last of the lives in the indentures of 1803 and 1812 shall fall, it is unnecessary for me to decide.

The conveyance to the respondent, bearing date the 27th of June 1834, and made under the Exchequer decree of the 21st of January 1832, was not made expressly subject to the said annuity of £20 a-year; but the covenant against incumbrances excepts "a certain annuity of £18. 9s. 3½d., payable out of the said lands of Ballydicken." £18. 9s. 3½d., present currency, is equivalent to the £20 a-year, late currency, and there is no doubt that the respondent had notice of the annuity, which was that referred to in the said covenant. What was sold, under the decree of the 21st of January 1832, to the respondent, was, in my opinion, subject to the contract for the rentcharge of £20 a-year, which was carried into effect by the indenture of the 6th of November 1812. An arrear of £92. 6s. 2d., of the said annuity of £20 a-year, late currency, having fallen into arrear, a bill was filed in 1839, by Matthias Phelan, against the respondent John Edward Redmond, to recover such arrear; and a decree *pro confesso* was pronounced against the respondent on the 11th of February 1840, who paid the arrear then claimed, and the costs; and the respondent continued to pay the annuity up to 1847. The bill, which was taken *pro confesso* against the present respondent, stated very precisely the facts from which the liability to pay the £20 a-year appeared. With respect to the decree *pro confesso*, I do not think that it absolutely estopped the respondent in this suit, as has been contended: *Hamilton v. Hamilton* (a); but I apprehend that the decree *pro confesso* was *prima facie* evidence, as against the respondent, of the facts stated in the bill, on which such decree was founded, having regard to the respondent having, after such decree, paid the arrears claimed by the bill, and the costs of the suit.† No evidence has been

(a) 3 Bligh, O. S., 184.

\* It appeared afterwards, by affidavit, that one of the lives is in being.

† See *The Earl of Miltown v. Stewart* (8 Simons, 371), affirmed on appeal, 3 M. & Cr. 18.

given to show that the claim then admitted was admitted under a mistake. If one of the lives in the indentures of 1803 and 1812 is in being, which, on the evidence, I am to presume is the case, the facts are not altered since the date of the decree *pro confesso*.

I am of opinion that the case of *Cremen v. Hawkes* (a), and the case of *Brady v. Fitzgerald* (b), do not apply, having regard to the fact that Matthias Phelan, the *quasi* landlord in the indenture of the 6th of November 1812, became, by the death of his father intestate, and as his heir-at-law, entitled to the interest of his father, under the said indenture. He was trustee for Parsons Frayne, but at Law he could not sue himself.

I think the petitioners are in the same difficulty, and have no remedy at Law; and having regard to the contract between Parsons Frayne and Matthias Phelan, which was a contract for a rentcharge, although carried out in a very strange manner, I am of opinion that the decision of the Master, which is in accordance with the justice of the case, is sustainable.

The motion will be refused, with costs.

(a) 8 Ir. Eq. Rep. 153 and 503.

(b) 12 Ir. Eq. Rep. 273.

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Judgment.

HARLEY v. HARLEY.

1860.  
April 17,  
July 9, Nov. 7.

THE petition was filed for a partnership account of the firm of Austin Harley and Company, and was referred to Master Brooke, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850. The case was now heard on appeal from an order

The defendant in an execution being the registered proprietor of shares in a ship, a writ of *fi. fa.* was delivered to

the Sheriff; and the solicitor for the creditor, by the direction of the Sheriff, procured the certificate of registry from the ship, and delivered it to the Sheriff, who retained it. The Sheriff was registered at the Custom-house, under the Merchant Shipping Act, as the owner of the shares, which were afterwards sold by him and transferred to the purchaser by a bill of sale, which was also registered.—*Held*, that the seizure was effectual, although the Sheriff did not go on board the ship, and that the property in the shares was regularly transferred by the bill of sale.

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*Rolls.*  
**HARLEY**  
*v.*  
**HARLEY.**  
*Statement.*

of the Master, made in this matter, on the 26th of January 1860, by which he declared that the several ships mentioned in the order were not duly or lawfully seized by the Sheriff, and were not duly or lawfully assigned to Edward Scott, the appellant.

The facts of the case, as they ultimately appeared, were as follows:—In June 1850, John Harley was a member of the firm of Austin Harley and Co. He retired from the firm in favour of James John Harley; and, in consideration of his so retiring, James John Harley executed a bond and warrant of attorney to enter judgment, to John Harley, for the penal sum of £2003. 1s. 11d., on which judgment was entered on the 14th of October 1856. On the 15th of October 1856, a writ of *fiery facias*, on foot of the judgment, was lodged with the Sheriff of Cork, and the Sheriff was required to seize, under the said writ, the shares of James John Harley in the several ships in question, which were the property of the firm. When the writ of execution was lodged with the Sheriff, none of the ships were in the harbour of Cork. As they successively arrived, the solicitors for the judgment creditors obtained, by the direction and authority of the Sub-sheriff, the certificate of registry of each vessel, and handed it over to the Sub-sheriff. The Sub-sheriff did not go on board, and make a formal seizure of the shares of James John Harley in the said ships. But he retained the certificates of registry until after the sale, and he then returned them to the other part-owners of the ship.

The certificate of registry of one of the vessels, the “Anne,” was in the following form:—

“CERTIFICATE OF BRITISH REGISTRY.

“This is to certify that, in pursuance of an Act passed in the 8th and 9th years of the reign of Queen Victoria, intituled ‘An Act for the Registration of British Vessels’—

“James Austin Harley, merchant, and John Harley, solicitor, having made and subscribed the declaration required by the said Act, and having declared that they, together with Edward Scott, architect, all of the city of Cork (signal letters K. C. J. P.), are sole owners (in the proportions specified on the back hereof) of the ship or vessel called the ‘Anne’ of Cork, which is of the

burthen of one hundred and seventy-nine 74-94th tons, and whereof Austin Harley is master; and that the said ship was built at Hylton, in the county of Durham, in the year 1833, as appears by the former certificate of registry, No. 40, granted at London, 12th of February 1833, now delivered up and cancelled, on a change of property; and Bryan Adams, tithe-surveyor, having certified to us that the said ship or vessel has, &c. (here followed a minute description of the vessel); and the said subscribing owners having consented and agreed to the above description, and having caused sufficient security to be given, as is required by the said Act, the said ship or vessel called the 'Anne' has been duly registered at the port of Cork.

"Certified under our hands, at the Custom-house, in the said port of Cork, this 8th day of December, in the year 1849.

"T. CASSELL, Collector.

"G. C. HAMILTON, Comptroller."

This certificate had the following indorsements:—

Names of the several Owners within mentioned.	Number of sixty-fourth shares held by each Owner.										
James Austin Harley, John Harley, Edward Scott,	<table> <tr> <td>Thirty-two</td><td>32</td></tr> <tr> <td>Sixteen</td><td>16</td></tr> <tr> <td>Sixteen</td><td>16</td></tr> <tr> <td></td><td>—</td></tr> <tr> <td></td><td>64</td></tr> </table>	Thirty-two	32	Sixteen	16	Sixteen	16		—		64
Thirty-two	32										
Sixteen	16										
Sixteen	16										
	—										
	64										

"T. CASSELL, Collector.

"G. C. HAMILTON, Comptroller."

"Custom-house, Cork,  
29th of May 1852." } Edward Scott, of the city of Cork, architect,  
has transferred, by bill of sale, dated the 31st of January 1852, sixteen sixty-fourth shares to James Austin Harley, of the city of Cork, and of the firm of Messrs. Austin Harley and Son, coal merchants. Certificate of Registry produced and indorsed this 1st day of October 1852.

"T. CASSELL, Collector."

"Custom-house, Cork,  
14th of March 1853." } James Austin Harley, of the city of Cork,  
coal merchant and ship-owner, has transferred, by bill of sale, dated the 12th of March 1853, sixteen sixty-fourth parts or shares, to James John Harley, of the city of Cork, coal merchant.

"J. ABBOTT, Collector.

"G. C. HAMILTON, Comptroller."

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1860.  
*Rolls.*  
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 —  
*Statement.*

"Custom-house, Cork,  
 14th of March 1853. } John Harley, of the city of Cork, attorney-at  
 law, has transferred, by bill of sale, dated the  
 12th of March 1853, sixteen sixty-fourth parts or shares, to James John Harley,  
 of the city of Cork, coal merchant or ship-owner.

"J. ABBOTT, Collector.

"G. C. HAMILTON, Comptroller."

The certificates of the other vessels were similar, *mutatis mutandis*, to the foregoing.

After the certificates were handed over to the Sub-sheriff, he produced them to Mr. Cassell, the Collector of the Harbour of Cork, and apprised him that the shares of James John Harley in each of the vessels had been seized, and the following declaration of ownership was made by him with respect to the "Anne":—

"I, the undersigned Thomas Ware, duly appointed Sub-sheriff of the county of the city of Cork, declare as follows:—James John Harley, the person appearing by the Register-book to be the owner of thirty-two sixty-fourth shares in the ship above described, was, on the 15th day of October 1856, duly dispossessed of said thirty-two sixty-fourth shares, by virtue of a writ of *feri facias*, directed to Sir William Lyons, High Sheriff of the said city of Cork, issued out of Her Majesty's Court of Queen's Bench in Ireland, bearing date the 14th day of October 1856; and that under said writ the said Sir William Lyons is entitled to be registered as owner of the said shares of the said ship: and I make this solemn declaration conscientiously believing the same to be true.

(Signed), in the presence of—"THOMAS WARE."

"Made and subscribed by the above-named Thomas Ware, 1st of November 1856.

(Signed)—"F. CASSELL."

An entry was also made in the register at the Custom-house at Cork, of which the following is a copy:—

The Sub-sheriff afterwards sold the shares of James John Harley in the several ships, for £1000, to Edward Scott, in trust for John Harley. The Sub-sheriff received that sum, and he transferred the shares by bill of sale to John Harley; and paid over the sum of

\* For entry see next page.

ENTRY REFERRED TO IN PRECEDING PAGE.

Initial Number of Ship, 8484.		Port of Cork. Name of Ship, "Anne."		No. and date of Registry. 27-8th of December 1849.	
Col. 1. Number of Transaction.	Col. 2. Letter directing Mortgages, and Certificates of Mortgages.	Col. 3. Name of person from whom title is derived.	Col. 4. Number of Shares affected.	Col. 5. Date of Registry.	Col. 6. Nature and date of Transaction.
1		James John Harley	32	1st November 1856, at 3½ o'clock, p.m.	Col. 7. Name, residence and occupation of Transferee, Mortgagee or other person acquiring title or power.  Sir William Lyons, Knight, High Sheriff of the county of the city of Cork.

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£954. 13s. 1d., the amount of the purchase-money, after deducting the fees and expenses, to John Harley.

The following entry was afterwards made in the register:—

Col. 1.	Col. 2.	Col. 3.	Col. 4.	Col. 5.	Col. 6.	Col. 7.
2		Sir Wm. Lyons, Knight	32	7th Nov. 1856, at ½ 3, p.m.	Bill of sale dated 7th November 1860	John Harley, of the city of Cork, Esq.

The following indorsement was also entered on the certificate of registry:—

Names of the several persons owners of the Ship within described, on the 14th of November 1856.	Number of shares held by each Owner.
James Austin Harley, of the city of Cork, Merchant	Thirty-two.
John Harley, of the city of Cork, aforesaid, Esq.	Thirty-two.

On the 6th of April 1857, John Harley assigned, by bill of sale, sixteen sixty-fourth shares of the said ships to Edward Scott; and the assignment was duly registered.

*Argument.*

Mr. *Chatterton* and Mr. *C. H. Woodroffe*, in support of the appeal, argued that the shares of John James Harley in the ships had been properly seized by the Sheriff, and properly transferred by him. As to the seizure, it had been made in the only way in which the nature of the property would admit of. The interest in a lease for years was seized by the Sheriff taking possession of the lease. The seizure of the certificate of registry of the ship was analogous to the seizure of the lease: *Doe d. Westmoreland v. Smith* (a); *Playfair v. Musgrove* (b); *Rex v. Deane* (c); *Taylor v. Cole* (d); *York v. Twine* (e); *Doe v. Douston* (f); *Doe v. Brawn* (g); *Coleman v. Rawlinson* (h); *Abbott on Shipping*, p. 259; *Woodgate v. Knatch-*

(a) 1 M. & R. 137.

(c) 2 Show. 85.

(e) Cro. Jac. 79.

(g) 5 B. & Ald. 243.

(b) 14 M. & W. 239.

(d) 3 T. R. 295.

(f) 1 B. & Ald. 230.

(h) 1 Fos. & Fin. 330.

*bull* (a). There was no form prescribed, for the transfer of the shares of a ship, by the Merchant Shipping Act; but the course adopted in this case was the usual one sanctioned by the Solicitor of Customs in London.

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Argument

Mr. *Berkeley*, for the petitioner, contended that, although the property in a ship might be symbolically seized, something more must be done than merely taking possession of the certificate of registry. The old rule was, that there must be an actual manual seizure by the Sheriff. That was afterwards modified; but it was still necessary that the Sheriff should go into possession of some part of the property: *Blades v. Arundale* (b); *Wilbraham v. Snow* (c); *Coleman v. Rawlinson* (d); *Mildmay v. Smith* (e); *Giles v. Grover* (f); *Godson v. Sanctuary* (g); *Johnson v. Evans* (h); *Balls v. Thick* (i); *Hall v. Roche* (k); *Housin v. Barron* (l); *Bac. Ab., Execution*, 4.

THE MASTER OF THE ROLLS.

A motion has been made in this case, by the respondent Edward Scott, by way of appeal from so much of the order of William Brooke, Esq., the Master in this matter, signed the 26th of January 1860, as declares that the several ships belonging to the firm of Austin Harley and Co. were not, nor was any of them, duly or lawfully seized by the Sheriff; and that same were not duly or lawfully assigned to the said Edward Scott, but continued partnership property; and that, instead thereof, it be declared that James John Harley's share in the several ships was duly seized by the said Sheriff, and was duly and lawfully assigned to the said Edward Scott, and did not continue the partnership property of the said firm. This case was brought before the Court, when the motion

Nov. 7.  
Judgment.

- |                     |                       |
|---------------------|-----------------------|
| (a) 2 T. R. 157.    | (b) 1 M. & Sel. 711.  |
| (c) 2 Saund. R. 47. | (d) 1 Fos. & F. 330.  |
| (e) 2 Saund. 344.   | (f) 9 Bing. 128.      |
| (g) 4 B. & Ad. 255. | (h) 7 Sco. N. R. 135. |
| (i) 9 Jur. 305.     | (k) 8 T. R. 187.      |
| (l) 6 T. R. 122.    |                       |

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*Judgment.*

was originally moved, in a very unsatisfactory manner, the facts not having been properly investigated; and upon the documents now before the Court, and which were not, I believe, before the Master, I do not understand what right Edward Scott had to move, as, although he became the purchaser under the execution, as trustee for John Harley the elder, the assignment, or bill of sale, by the Sheriff, was to the said John Harley.\* However, as Edward Scott purchased under the execution, as trustee for John Harley, I shall not turn the appellant round on this objection, but allow a proper notice now to be served; but it is most inconvenient, the parties not having taking the trouble of laying copies of the documents before the Master, or having the case argued before him on the actual state of facts.

The *feri facias*, under which the Master held there was no seizure, was issued on a judgment obtained by the said John Harley against the said James John Harley, and was delivered to the Sheriff on the 15th of October 1856, and was returnable on the 3rd of November 1856, but was not returned until the 11th of July 1860, although it should, of course, have been returned before the case was heard before the Master. It was a strange proceeding to ask the Court to decide on the validity or invalidity of proceedings under a writ not returned.

The Sheriff, by his return, states that he caused to be made of the goods and chattels of the said John James Harley the sum of £1027. 10s., part whereof he retained for poundage and expenses, and £972. 10s., the residue thereof, he rendered to the said John Harley, in part satisfaction of his debt and costs.

This was a suit for the taking of the partnership accounts of the firm of Austin Harley and Company, and which was referred to the Master, under the 15th section of the statute. The petition is framed in such a manner that it is very difficult to understand the prayer of the petition. It seeks that the Court should declare that "the said co-partnership has been dissolved, and is at an end;" and it then seeks that the necessary partnership accounts should be taken. Now the petition adverts to different partnerships, and,

\* It appeared, after the Court had given judgment, that, on the 6th of April 1857, John Harley assigned some of the shares to Edward Scott.

therefore, it is very difficult to determine what is meant by the term "the said co-partnership," in the prayer. I believe the co-partnership intended to be referred to was that formed on the 7th of June 1850, between Austin Harley, the petitioner James Austin Harley and James John Harley. If that be so, it is difficult to understand how, in such suit, the question as to the validity of an execution against James John Harley, at the suit of John Harley, should properly arise or be properly decided. The principal respondent is Eliza Henrietta Harley, the personal representative of James John Harley, deceased, who was the defendant in the execution. John Harley, the plaintiff in the execution, had been a member of a former firm, and he retired from the firm in favour of the said James John Harley, about the month of June 1850; and in consideration thereof the said James John Harley executed a bond and warrant of attorney, dated the 7th of June 1850, in the penalty of £2003. 1s. 11d., on which judgment was entered on the 14th of October 1856. The writ of *fiery facias* was delivered to the Sheriff of the city of Cork, on the 15th of October 1856. The solicitor for John Harley, the execution creditor, required the Sheriff to seize under the said writ the shares of the said James John Harley, the defendant in the execution, in the several ships following; that is to say, the "John Harley," the "Darnley," the "Markland," the "Sutcliffe," the "Jessie," and the "Anne;" and the question, supposing it can be decided on the record in this suit, is, whether the Master was right in holding that the shares of the said James John Harley in those ships were not duly or lawfully seized, or duly or lawfully assigned?

The facts of the case, as they appear by affidavits made on the 2nd and 15th of June, by the Sheriff and by the solicitor for the plaintiff in the execution, and which were made since the appeal was moved, are as follow:—At the time of the lodgment of the execution with the Sheriff, none of the said ships were in the port of Cork, and therefore they were not within the bailiwick of the Sheriff, the ships being on voyages to the port of Cork. The affidavit of the solicitor for the plaintiff in the execution states that the ships would not be allowed to go to sea without having the registers on board; and that the register must always be kept on board, for her

1860.  
*Rolls.*  
HARLEY  
v.  
HARLEY.  
*Judgment.*

1860.  
*Rolls.*  
**HARLEY**  
*v.*  
**HARLEY.**  
*Judgment.*

lawful navigation. That the said vessels arrived at the port of Cork on the following days respectively, that is to say, the "John Harley" on the 26th of October 1856; the "Darnley" on the 29th of October in said year; the "Markland" on the 28th of October in said year; the "Sutcliffe" on the 27th of October in said year; the "Jessie" on the 23rd of October in the said year; and the "Anne" on the 22nd of October in said year. The said vessels remained in the port of Cork, within the bailiwick, until some time after the execution by the Sheriff of the bills of sale of the shares therein respectively of the said James John Harley. The solicitor for the execution creditor, as each of the said vessels arrived, at and immediately after such arrival, and while each vessel was lying at the port of Cork, obtained, by the directions and authority of the Sub-sheriff, from on board each such vessel, her register, and handed over same to the Sub-sheriff, at the respective times following:—that is to say, the register of the "John Harley" on or about the 26th of October 1856; that of the "Darnley" on or about the 29th of October in said year; that of the "Markland" on or about the 28th of October in said year; that of the "Sutcliffe" on the 27th of October in said year; that of the "Jessie" on the 23rd of October in said year; and that of the "Anne" on the 22nd of October in said year.

The Sub-sheriff retained the said registers until he had completed the sale of the shares of the said James John Harley in said vessels respectively; and the Sub-sheriff, after he had completed the sales, returned the registers to the other part-owners of the vessels. Copies of the registers, in the state in which they were when delivered to the Sheriff, and copies of the registers in their present state, have been verified and laid before the Court.

The Sub-sheriff did not go on board the vessels and make a formal seizure of the shares of James John Harley therein, considering that the lodgment of the register of each vessel with him (the vessels being within his bailiwick at the time) authorised him to sell the shares of the defendant in the execution in each vessel, and to make an assignment and transfer of such shares, under the provisions of the Merchant Shipping Act.

The Sub-sheriff sold to Edward Scott, in trust for John Harley

the elder, the plaintiff in the execution, the said shares, for £1000; and the affidavit of the Sub-sheriff, filed the 2nd of June 1860, states that he received said sum, and that, on the 17th of October 1856, he paid to the said John Harley the elder the sum of £954. 13s. 1d., in part payment of the sum due on the execution; and the affidavit then accounts for the balance.

The copies of the documents which have been produced, and which are made evidence by the 107th section of the Merchant Shipping Act, establish the mode in which the transfers of the shares of James John Harley, the defendant in the execution, were made by the Sheriff; and it will be sufficient, as an example, to take the case of the vessel called the "Anne."

The document indorsed "O" is a copy of the register of the "Anne," the original of which was lodged with the Sub-sheriff on the 26th of October 1856. The Sub-sheriff having produced to the Registrar in Cork the said writ of *fiery facias*, the following entry was made by the Registrar, in the books kept for the purpose of registering transfers, under the provisions of the Merchant Shipping Act. The port is stated "Port of Cork;" the name of the ship is entered "Anne;" under a column headed "name of person from whom title is derived," the name of "James John Harley," the defendant in the execution, is entered; under the column headed "number of shares affected," the number "32" is entered; under the column headed "date of registry" is entered "1st of November 1856, at 3½ p.m.;" under the column headed "nature and date of transaction," is entered "writ of *fiery facias*, forth of Her Majesty's Court of Queen's Bench, Ireland, dated the 14th of October 1856;" and under the column headed "name, residence and occupation of transferree, mortgagee, or other person acquiring title or power," is entered "Sir William Lyons, Knight, High Sheriff of the county of the city of Cork."

On the same 1st of November 1856, the High Sheriff executed to John Harley, the plaintiff in the execution (Edward Scott having purchased in trust for him), a bill of sale of the thirty-two shares of James John Harley, the defendant in the execution; and the High Sheriff thereby covenanted, for himself and his heirs, that he had power to transfer the said shares, and that

1860.  
Rolls.  
HARLEY  
v.  
HARLEY.  
Judgment.

1860.  
*Rolls.*  
 HARLEY  
 v.  
 HARLEY.  
*Judgment.*

same were free from incumbrances. It appears that said bill of sale was registered under the provisions of the Merchant Shipping Act, on the 7th of November 1856. In the copy of the entry produced from the registry in the port of Cork, duly certified, in the column headed "name of person from whom title is derived," is entered "Sir William Lyons, Knight;" under the column headed "number of shares affected," is entered the figure "32;" under the column headed "date of registry," is entered "7th of November 1856, at  $\frac{1}{3}$  P.M.;" under the column headed "nature and date of transaction," is entered "bill of sale dated 7th of November 1856;" and under the column headed "name, residence and occupation of transferee, mortgagee, or other person acquiring title or power," is entered "John Harley, of the city of Cork, Esquire."

By the same document, and by another document also given in evidence, it appears that thereupon the registered owners of the vessel were "James Austin Harley, and John Harley." The transfers of the shares of James John Harley, in the five other ships, were made in a similar manner, and the same questions arise as to each vessel.

The Master has by his order declared that the said ships "were not, nor was part thereof, duly or lawfully seized by the Sheriff, nor were they lawfully assigned to Edward Scott, but continued partnership property." It is very unsatisfactory, and leads to much difficulty, when the facts are so inaccurately investigated, that the Master, the Counsel, and the solicitors on both sides, were unacquainted with the contents of the written documents, and the facts of the case when it was decided by the Master. There was no assignment by the Sheriff to Edward Scott, although he is the appellant. The bill of sale from the Sheriff was to John Harley, the plaintiff in the execution, and not to Edward Scott. Edward Scott, however, had purchased in trust for John Harley.

The Master appears to have held that, as there was no actual seizure of the shares of James John Harley in the vessels, and as the Sheriff did not go on board each vessel, and make what could only have been a formal seizure of the thirty-two sixty-fourth parts or shares of the

said James John Harley, that everything done by the Sheriff is actually null and void; and that all the entries made under the Merchant Shipping Acts are null and void; and that although John Harley was registered as owner of the thirty-two sixty-fourth shares, he was not an owner. I do not think the question decided by the Master is open on the present petition, under the 15th section. The Sheriff entered into an express covenant, by the bills of sale, that he had power to transfer. If he has improperly sold, he might be liable to an action, at suit of the defendant in the execution; and to an action on the covenant, at suit of John Harley. I think there is ground for saying that, if the sale is sought to be impeached, it should have been in a suit of the said Eliza Henrietta Harley, as personal representative of James John Harley, to which the Sheriff should be a respondent; and seeking that John Harley should re-transfer the shares, and thus have the registry set right. The Master has in effect nullified the registry, in a collateral proceeding for the taking of a partnership account, to which I have adverted in the commencement of my judgment; and how the registry, which it was the policy of the Merchant Shipping Acts should be the evidence of the title, is to be set right in the present suit, and under the Master's decision, has not been suggested.

Supposing, however, the question decided by the Master to be open for consideration in this suit, the first question which arises is, whether the Sheriff was bound to go on board each vessel and seize (not the ship, as he had no right to seize the entire ship, but) thirty-two sixty-fourth undivided parts of the ship the property of the defendant in the execution. It has not been suggested in what way a Sheriff is to seize thirty-two sixty-fourth undivided parts of a ship. If we were to answer the question upon the principles of common sense, it would be, as laid down in *Collier on Partnership*, 2nd ed., p. 560, that, "under a judgment against one partner, the way in which the Sheriff executes the writ in practice is, by making a bill of sale of the actual interest." That was done in the present case. A part-owner of a ship is not necessarily a partner. He is a tenant in common with the other part-owners: *Abbott on Shipping*, 10th ed.,

1860.  
Rolls.  
HARLEY  
v.  
HARLEY.  
Judgment.



1860.  
*Rolls.*  
**HARLEY**  
*v.*  
**HARLEY.**  
*Judgment.*

p. 66; but the shares of a part-owner are not transmissible by delivery; and the same principle applies as laid down by Mr. *Collier*. If the thirty-two sixty-fourth shares of the defendant in the execution were capable of transfer by delivery by the Sheriff, there might be ground for contending that there should have been an actual seizure; but the question is, whether it is necessary for a Sheriff actually to seize that which is not capable of transfer by delivery, but must be transferred in a particular manner provided by statute? That a distinction exists between property which passes by delivery, and property such as a chattel real, which does not, is adverted to by Chief Baron Pollock, in *Playfair v. Musgrove (a)*. His Lordship said:—"I think it is quite clear that the term remains in the original lessee until an actual assignment by the Sheriff; and I cannot at all accede to the suggestion in argument that, on the seizure of a term of years, the term becomes vested in the Sheriff until he executes an assignment of it to the purchaser. It may be that things which pass by delivery are, for some purposes, vested in the Sheriff by the act of seizure; but, in the case of chattels real, it is not so."

In the case of *Doe v. Jones (b)*, it appeared that a lease was taken in execution; that is, what represented the property was taken in execution—just as the original ship registers, which were lodged with the Sheriff in the present case, represented the shares in the ship. The Sheriff, in the case of *Doe v. Jones*, sold to the execution creditors; but he executed no assignment of the term to the purchasers. It was held that the estate remained in the debtor, and that he could recover back the premises in an ejectment. There are cases referred to in *Doe v. Jones*, which appear to establish that an actual seizure of the lands held under a chattel lease is not necessary; but that the delivery of the *feri facias* to the Sheriff gives him a power to sell the term. At all events, a seizure of the lease itself is sufficient. In the case of *Doe v. Douston (c)*, it appears that it was the lease which was taken in execution. In the case of *Doe v. Browne (d)*, it

(a) 14 M. & W. 245.

(b) 9 M. & W. 372.

(c) 1 B. & Ald. 231.

(d) 4 B. & Ald. 243.

appears also that it was the lease which was taken in execution. It is not at all clear that it is even necessary to seize the lease. In the case of *Coleman v. Rawlinson* (a), an ejectment was brought for the recovery of a term, by the assignee of the Sheriff, under a writ of execution. The judgment and assignment having been proved, Counsel for the defendants objected that there was no proof of an actual seizure of the lease of the property. Mr. Justice Willes said, "that is unnecessary; the assignment is sufficient evidence of the seizure. The Sheriff under the *fi. fa.* could not enter on the land; he could only seize the lease; and that need not be seized to give validity to an assignment."

It appears, from that case, that it is not necessary for the Sheriff to seize a lease, or enter on the lands; and it is sufficient for the Sheriff, he having acquired a power of sale by the delivery of the *fi. facias*, to execute the assignment, without any seizure whatever; but, if the seizure of a lease is necessary, it is only a constructive seizure of the chattel real: and, I think, where, under the Merchant Shipping Act (the sections of which I shall just now refer to), the transfer of a ship, or shares therein, is to be in writing, and recorded as thereby directed, that it was not necessary for the Sheriff to go on board the vessels; but that, as the original registers, which established the title of the defendant in the execution to the shares, were lodged with the Sheriff, the Registrar of the port of Cork was justified in registering the right of the Sheriff under the execution, so as to enable him under the Act to execute a bill of sale to the purchaser under the execution; which bill of sale was duly executed and registered. I have no doubt that, if inquiry was made, it would turn out that the course adopted in the port of Cork in this case was in conformity with the course adopted in the principal English seaports.

With respect to the Merchant Shipping Acts, there is no express clause authorising a Sheriff to sell shares in a ship. Mr. *Dowdeswell*, in his work on these Acts (page 39), states:—"A conveyance by bill of sale is not, however, the only means by which the registered owner may be divested of his property. The title to a ship,

1860.  
*Rolls.*  
HARLEY  
v.  
HARLEY.  
Judgment.

(a) 1 F. & Fin. 330.

1860.  
Rolls.  
**HARLEY**  
 v.  
**HARLEY.**  
Judgment.

like that to any other chattel, may be transmitted. Thus a ship may be seized under an execution, or pass to assignees under a bankruptcy or insolvency, or to her husband upon the decease of a female owner; and upon death it will pass to the personal representatives." Mr. *Dowdeswell* adds:—"In the case of an execution, a bill of sale (*i. e.*, of a ship) would be executed by the Sheriff, which is the ordinary mode of executing the power of sale vested in him." The 58th section of the Act appears to use general words which would embrace an execution. The 55th, and several other subsequent sections, relate to the transmission and transfer of ships and shares therein. The terms of the Act previously in force (8 & 9 Vic, c. 89, s. 38) prevented the Court of Chancery from interfering in any way where the transferee named in a bill of sale had got it registered and indorsed on the certificate, even though this may have been obtained without paying the purchase-money, or by means at variance with the agreement between the parties. Though the ship was purchased with partnership moneys, and it had been treated as partnership property, the Court of Chancery could not interfere on behalf of partners whose names did not appear on the register. Mr. *Dowdeswell* refers to the cases at p. 277 of his work. There is, however, some doubt whether those cases apply to the present Merchant Shipping Act, as the 57th section of that Act differs in some important particulars from the sections of the former Acts, on the construction of which those cases were decided. I cannot, however, come to the conclusion which the Master has, that, in a petition to take partnership accounts, under the 15th section of the statute, the Court is to treat as absolutely null and void the title on the register, without any substantive proceedings to set the register right, if it be erroneous. I do not think that the questions which the Master has decided are open on the present petition; but I am also of opinion that, if they were open, the Master's decision on the facts in issue and in proof is erroneous. I shall, therefore, set aside the order of the Master, so far as it declares that the shares of the defendant in the execution were not lawfully assigned; and I shall declare that the said shares were lawfully assigned by the Sheriff; and I shall remit the case back to the Master, with such declaration.

An affidavit was sent to the Court, made by the solicitors for Eliza Henrietta Harley, filed the 19th of October, verifying several copies of documents from the registry in Cork. These documents are, I believe, only duplicates of those I have referred to. I shall not, however, enter them on the order at this stage of the proceedings. The case ought to have been fully investigated before the case was heard by the Master. If it had been, it is not improbable that he might have formed a different opinion.

1860.  
*Rolls.*  
**HARLEY**  
*v.*  
**HARLEY.**  
*Judgment.*

The MASTER OF THE ROLLS observed, on a subsequent day, that it appeared, from copies produced from the registry, that, on the 6th of April 1857, John Harley assigned to Edward Scott some of the shares which had been assigned by the Sheriff to John Harley; which might account for the appeal being by Edward Scott.

**Ex parte SPEAR, in the Matter of the DUNDALK  
AND ENNISKILLEN RAILWAY COMPANY.**

*Nov. 22, 28.*  
*1861.*  
*Jan. 21.*

THE petition was presented under the Railway Act (Ireland) 1851. The Railway Company went into possession of certain lands of the petitioner, on the 27th of June 1859. On the 8th of March 1860, the arbitrator awarded £150 to the petitioner, with interest from the 27th of June 1859. The petitioner traversed, and obtained a verdict for £250, on the 5th of July 1860. The Railway Company, on the 1st of November 1860, lodged in Court £250, the amount of the verdict, and £2. 8s. 9d. interest at £4 per cent., from the date of it. The petitioner claimed £5 per cent. interest on the amount of the verdict, from the 27th of June 1859. The facts of the case, and the sections of the Act on which the question depended, are fully stated in his Honor's judgment.

A person who traverses the award of the arbitrator, under the Railways Act (Ireland) 1851, is not entitled, under the 22nd section of the Act, to interest at £5 per cent. on the amount of the damages awarded by the verdict, from the time when the Railway Company went into possession of the lands.

1860.  
*Rolls.*  
*In re*  
**D. AND E.**  
**RAILWAY.**

*Argument.*

Mr. *T. K. Lowry*, for the petitioner, contended that he was entitled, under the 22nd and 27th sections, to interest at £5 per cent. from the time the Company went into possession.

Mr. *W. Boyd*, for the Company, contended that the 22nd section, which gave interest, applied only to money lodged in pursuance of the certificate of the arbitrator. Under the 27th section, the amount awarded by the verdict is to be taken "in lieu of the moneys payable by the certificate;" that is, in lieu of the amount awarded by the certificate, and the interest on it. The petitioner was, therefore, only entitled to interest at £4 per cent. on the amount of the verdict, from its date, under the 3 & 4 *Vic.*, c. 105, s. 26.

1861.  
*Jan. 21.*  
*Judgment.*

**THE MASTER OF THE ROLLS.**

In this case the petition has been presented by Hugh Spear. The petition prays that the Accountant-General do draw in favour of the said Hugh Spear, or his attorney lawfully authorised, for the sum of £252. 8s. 9d. cash, standing to the credit of this matter, £250 thereof being the amount of compensation awarded to the said petitioner, in respect of certain lands in the petition mentioned, the property of the petitioner, and which was ascertained by a verdict of a jury of the county of Monaghan to be the sum payable to the petitioner on a traverse for damages entered by the petitioner; and the petitioner claims the balance in Court, in part payment of interest on the £250, at the rate of £5 per cent., from the 27th of June 1859, being the day on which the Company took possession of the said lands, until the 3rd of November 1860, when the said sum of £252. 8s. 9d. was lodged to the credit of this matter by the said Railway Company; and the petition further prays that the said Company may pay to the petitioner the balance of the said interest, together with his costs.

The facts of the case are as follow :—William Paul Prendergast, having been appointed arbitrator in this matter under the provisions of the Railways Act (Ireland) 1851,\* made his draft award on the 5th of October 1858. The said Railway Company, pursuant to the

\* 14 & 15 *Vic.*, c. 70.

powers in said Act, section 22, took compulsory possession of the said lands on the 27th of June 1859, and have since continued in possession, for the purposes of the Railway. The arbitrator made his final award on the 28th of September 1859, whereby he awarded to the lessee of the said lands (*i. e.*, the petitioner) £16. 14s. 0d. for the value of the said lessee's interest in the lands, and the further sum of £133. 6s. 0d. for compensation to the said lessee, by reason of severance and other consequential damages, making together £150. The petitioner, under the provisions of the Act, required the Company to deliver to him a certificate stating the amount of compensation to which he was entitled under the award. The petitioner's solicitor was furnished by the said Company, on the 8th of March 1860, with the said certificate, by which it was certified that the petitioner was entitled to be paid the said two sums of £16. 14s. 0d. and £133. 6s. 0d., making together the sum of £150, together with interest on the said sum of £150, at the rate of £5 per cent. per annum, from the 27th of June 1859 until payment of the said sum, or lodgment of the same in Bank, pursuant to the provisions of the said Act.

The petitioner, being dissatisfied with the amount in such certificate, entered a traverse for damages, under the 26th section of the said Act; and the traverse having been tried at the Assizes for the county of Monaghan, on the 5th of July 1860, the jury found a "verdict for the traverser in the sum of £250, made up in the following manner; viz., value of land taken by Railway Company, £55; to replace office-houses, £45; severance and consequential damages, £150." The above are the terms of the verdict, as certified by the Clerk of the Crown for the county of Monaghan.

The Company, pursuant to a deposit-warrant, dated the 1st of November 1860, paid into the Bank of Ireland, to the credit of this matter, £252. 8s. 9d.; but the said sum is insufficient for payment of the said verdict, with interest thereon at £5 per cent. from the 27th of June 1859, the day on which the Company entered into possession of the said lands. The sum of £252. 8s. 9d., lodged to the credit of this matter, consisted of the £250 found by the verdict, and £2. 8s. 9d. interest thereon at £4 per cent. from the date of the

1861.  
*Rolls.*  
*In re*  
D. AND E.  
RAILWAY.  
*Judgment.*

1861.  
*Rolls.*  
*In re*  
 D. AND E.  
 RAILWAY.  
*Judgment.*

verdict to the lodgment in Court. The £4 per cent. interest was lodged, not under the Railways Act (Ireland) 1851, but as interest, under the 3 & 4 *Vic.*, c. 105, s. 26.

An affidavit has been made by the apprentice of the petitioner's solicitor, in which he states that he attended personally at the trial of the traverse in this matter, at the last Monaghan Assizes; and that at the close of the case, and when the learned Judge had charged the jury, the traverser's Counsel proposed that the amount of interest on the purchase-money should be added to the sum to be found by them, and included in their verdict; but that the Company's Counsel and solicitor objected to the same, upon the ground that the jury had nothing to do with the interest, which was provided for by the Act of Parliament; and the learned Judge having taken that view, he declined to direct the jury to include it in their verdict, and it formed no part thereof. That the jury did not include the interest in their verdict appears on the certificate of the finding of the jury, signed by the Clerk of the Crown.

The question of Law which arises in the case depends on the construction to be put on the 22nd and 26th sections of the said Act (14 & 15 *Vic.*, c. 70). The petitioner's Counsel contend that they are entitled to interest at £5 per cent. on the amount of the verdict for £250, which verdict was found on the 4th of July 1860, from the 27th of June 1859, the day on which the Company took possession, to the 3rd of November 1860, when the amount of the verdict, with £4 per cent. interest from its date, was lodged in Court. The Company's Counsel contend that the verdict does not bear any interest under the said Act, but that it does bear interest at £4 per cent., under the 3 & 4 *Vic.*, c. 105, s. 26, from the date of such verdict, viz., from the 5th of July 1860 to the 3rd of November 1860, when the amount of the verdict was lodged in Court; such verdict having the effect of a judgment, under the 27th section of the said Act of the 14 & 15 *Vic.*, c. 7, the Railways Act (Ireland) 1851.

The 22nd section of the Railways Act (Ireland) 1851 gives power to a Company to whom that Act extends to enter upon any lands, for the purposes of their works, after the arbitrator shall have

framed his draft award, upon depositing, in the Bank of Ireland, such sum as the arbitrator may certify to be, in his opinion, the proper sum to be so deposited; and then follows this proviso: "Provided that the Company shall, where they enter upon any lands, by virtue of this present provision, pay interest at the rate of £5 per cent. per annum *upon the purchase and compensation-money payable by them in respect of any lands so entered upon*, from the time of their entry until the payment of such money and interest to the party entitled thereto; or where, under the provisions of this Act, such purchase or compensation-money is required to be paid into the said Bank, then until the same, with such interest, is paid into such Bank accordingly; and where, under this provision, interest is payable on any purchase or compensation-money, the certificate to be delivered by the Company, in respect thereof, shall specify that interest is so payable; and the same shall be recoverable in like manner as the principal money mentioned in such certificate."

1861.  
Rolls.  
In re  
D. AND E.  
RAILWAY.  
Judgment.

It is admitted that, under the provisions of that section, interest at £5 per cent. would have been payable upon the sum of £150, certified by the arbitrator to be the proper sum to deposit, from the period of the entry of the Company on the 27th of June 1859, if there had been no traverse. But in considering the question which arises on this petition, as to whether the Court has power to make an order, it is to be kept in mind that the principal sum, together with the interest, awarded by such certificate, is to be recovered by entering judgment on the certificate in the Court of Queen's Bench, under the 15th section of the statute. The question then arises, whether the sum awarded by the jury, under the 26th section, to which I shall now refer, is to be considered as "the purchase or compensation-money payable by the Company in respect of any lands so entered upon;" and if so, whether such interest is recoverable by the present petition?

By the 26th section it is enacted that, if any party named in any certificate issued under the provisions of the said Act, of the amount of "the price or compensation" ascertained by any award under the Act, shall be dissatisfied with the amount in such certificate



1861.

*Rolls.**In re*  
D. AND E.  
RAILWAY.*Judgment.*

certified to be payable, it shall be lawful for such party to have a traverse for damages entered in the Crown-book, in respect of such claim; and thereupon such traverse shall be tried in like manner, and like proceedings shall be had, and subject to like provisions, so far as the same can be applied, as in the case of traverses entered for damages under the Grand Jury Acts. The 27th section provides that the verdict "shall have the effect of a judgment at Law, obtained in the Court of Queen's Bench in Ireland, against the Company, and may be enforced, by like remedies, against the Company, as in the case of a judgment at Law, by all persons interested therein; and in each case where a certificate shall have been delivered, such damages shall be taken and recovered in lieu of the moneys expressed to be payable by the certificate, and which shall, on the payment of the damages, and any costs payable by the Company, be delivered up to the said Company, and such receipt, for damages shall be given as is hereinbefore provided in cases of payment of moneys on such certificates as aforesaid." What follows does not appear to give jurisdiction to the Court of Chancery, on petition, where the amount of the damages is lodged in Court. The provision is as follows:—"And where such damages shall be given in respect of any land, the amount of the price or compensation in respect of which, as ascertained by an award under this Act, shall have been paid into Court, then, if the amount of such damages shall be less than the amount paid into Court, the Company shall, on a summary application by petition, be entitled to receive the difference between the amount of such damages and the amount of the sum paid into Court. But if the amount of such damages shall exceed the amount of the moneys paid into Court, then the difference between the amount paid in and the damages shall, at the costs of the Company, be paid into Court; and the payment of such difference into Court, and the payment of any costs payable by the Company in respect of such traverse, shall be a good discharge to the Company, on any such verdict, in the nature of a judgment as aforesaid."

The difficulty in the case is this; where there is no traverse for damages, the amount of the certificate to be given by the Company to the party whose land is taken is to be recovered in the manner

pointed out by the 15th section of the said Act, the Railways (Ireland) Act 1851, *i. e.*, by entering up judgment in the Court of Queen's Bench against the Company, in the manner pointed out by that section. The mode of recovering the amount of the verdict (which is to have the effect of a judgment) is provided for by the 27th section, and is to be by proceeding in the Queen's Bench. The remedy by petition is only in the cases mentioned at the close of the 27th section; that is, first, if the damages recovered shall be less than the amount paid into Court, the Company, by petition, are entitled to receive the difference between the amount of such damages and the amount of the sum paid into Court. That is not the present case. Then follows the provision where the amount of the damages shall exceed the amount of the moneys paid into Court (*i. e.*, paid in under the certificate of the arbitrator). That is the present case. In such case the said 27th section provides that "the difference between the amount paid in (*i. e.*, under the certificate) and the damages shall, at the costs of the Company, be paid into Court." The Company have done more than is thereby required, for they have lodged the entire damages in Court, with interest at £4 per cent. from the date of the verdict. The section then provides that "the payment of such difference into Court, and the payment of any costs payable by the Company in respect of such traverse, shall be a good discharge to the Company, on any such verdict, in the nature of a judgment as aforesaid." The whole damages have been paid into Court.

I do not, therefore, see what jurisdiction the Court has to decide that a further sum, in addition to the verdict (which is in effect a judgment), is to be paid into Court.

The question raised in this case has been overlooked by the Legislature; and I do not see how I can give relief to the petitioner. I offer no opinion whether the interest can be recovered by any application to the Court of Queen's Bench; but the statute does not give jurisdiction to this Court to add to the verdict, or to compel the payment of any sum not recoverable in the Court of Queen's Bench by proceedings on the verdict. I shall, therefore, make no rule on the petition. Each party will abide their own costs.

1861.  
Rolls.  
In re  
D. AND E.  
RAILWAY.  
Judgment.

1860.

*Rolls.*

Nov. 20.

1861.

Jan. 14, 18.

## THORNTON v. THORNTON.

A testator, having three sons, A, B and C, devised certain property to A; and other leasehold property, together with all the stock-in-trade which should be in the premises, to B and C, as tenants in common; and in case his said sons, or either of them, should die without leaving lawful issue him surviving, he directed that the share of such son so dying, in the premises, and in the stock-in-trade which should be therein at the time of such decease, should go to and be divided, share and share alike, between such of his said sons as should be then living, as tenants in common. B and C carried on the trade after the testator's death; and B died without issue, leaving A and C surviving.

GEORGE THORNTON the elder, who was a tanner and soap and candle manufacturer, made his will, bearing date the 7th of August 1853, by which he devised to his son William Thornton certain leasehold premises; "And as to all the remainder of the leasehold property hereinbefore mentioned, and all buildings and improvements thereon, and the stock-in-trade therein, together with all the stock-in-trade which shall be in the premises so bequeathed to my son William, and all goods, chattels and effects whatsoever, money and securities for money, and all property of every description, whether real, freehold or personal, of what nature or kind soever, or wheresoever situated, and not hereby bequeathed as aforesaid, which I shall die seised, possessed of, or in any manner entitled to, subject to the payment of my just debts, testamentary and funeral expenses, and to the legacies hereinafter bequeathed, and which I hereby expressly charge thereon, I leave and bequeath the same unto my sons Edward Thornton and George Thornton, share and share alike, to be held and enjoyed by them as tenants in common, and not as joint tenants; and in case my said sons Edward and George, or either of them, shall die without leaving lawful issue him surviving, then and in such case it is my will, and I order and direct, that the share of such son so dying, in the premises so comprised in said respective leases, and in the buildings and improvements erected and made thereon, and in the stock-in-trade which shall be therein at the time of such decease, shall go to and be divided, share and share alike, between such of my said sons as shall be then living, to be held and enjoyed by them as tenants

*Held*, that no case of election arose, there being no condition attached to the bequest, that the stock on the premises, at the death of either of the sons, should be subject to the bequest. A, therefore, is only entitled to a moiety of the stock-in-trade at the testator's death.

in common, and not as joint tenants; and if but one such son shall be then living, then the entire to go and be held and enjoyed by such one only surviving son:” and, after bequeathing certain legacies to his daughters, the testator desired “that the working capital of my said sons shall not be diminished or infringed upon too suddenly by such legacies, or either of them, being promptly demanded.”

The testator died on the 8th of May 1854, leaving three sons, George, Edward and William, and several daughters. The business was carried on after his death, by his sons George and Edward. George Thornton the younger died unmarried and without issue, on the 9th of November 1856.

The petition was filed by William Thornton, for the administration of the real and personal estate of the testator. The matter was referred to Master Brooke, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850. The Master ascertained the stock-in-trade of the testator, at the time of his death, to amount in value to £297; and he declared, by his decretal order, that the petitioner was entitled under the will to one-fourth of that sum (£74. 5s.); and he declared that he was not entitled to any share or interest in the stock-in-trade which existed on the premises, which did not form part of the stock-in-trade of the said testator at the time of his death.

The petitioner appealed, on the ground that the stock-in-trade which existed on the premises at the death of George Thornton the younger was subject to the limitation over on his death without issue, and became on that event divisible between the petitioner and the respondent Edward Thornton.

Mr. Serjeant *Sullivan* and Mr. *C. H. Woodroffe*, for the petitioner, contended that a case of election arose. If George Thornton accepted the benefit of the bequest, he was bound to comply with the condition that the stock on the premises, at his death without issue, should be subject to the limitation over: *Messenger v. Andrews* (a); *Earl of Northumberland v. Marquis of Granby* (b). The testator

1860.  
*Rolls.*  
THORNTON  
v.  
THORNTON.  
—  
*Statement.*

*Argument.*

(a) 4 Russ. 478.

(b) Ambl. 54; S. C., 1 Eden, 489.

1860.  
*Rolls.*  
 THORNTON  
*v.*  
 THORNTON.

—  
*Argument.*

expressly directed that "the stock-in-trade which shall be therein at the time of" the decease of either of his sons should go over. The word "my" is not used as in the case of *Usticke v. Peters* (a), which is relied on by the respondents.

Mr. *Brewster*, Mr. *Berkeley*, Mr. *Chatterton* and Mr. *Jones*, for the respondents.

In order to raise a case of election, the intention of the testator to bequeath property not his own must be clearly and unequivocally expressed. No such intention is expressed in this case: *Lord Randeliff v. Perkins* (b); *Dillon v. Parker* (c); *Dummer v. Pitcher* (d); *Cosby v. Lord Ashtown* (e); *Usticke v. Peters* (f); 1 *Jarman on Wills*, pp. 378-9.

1861.  
 Jan. 14.  
*Judgment.*

#### THE MASTER OF THE ROLLS.

A motion has been made on behalf of the petitioner, by way of appeal from the decretal order of William Brooke, Esq., the Master in this matter, which order bears date the 10th of May, and was signed on the 7th of August 1860.

This is a suit for the administration of the assets of George Thornton the elder, and to have the trusts of his will carried into execution.

The case was referred to the Master, under the 15th section of the statute. It is declared by the said order, that the petitioner is not entitled, under the will of the said George Thornton the elder, "to any share or interest in the stock-in-trade which existed on the premises (by the said will bequeathed to Edward Thornton and George Thornton the younger), which did not form part of the stock-in-trade of the said testator at the time of his death;" and it was by the said order further declared, that the said petitioner was "entitled, under the said will, to the value of one-fourth part or share of the said stock-in-trade, in the second schedule set forth;" and it was further declared that the value of such one-fourth was

(a) 4 K. & J. 453.

(c) 1 Swanst. 82.

(e) 10 Ir. Ch. Rep. 219.

(b) 6 Dow. P. C. 149.

(d) 5 Sim. 35.

(f) *Ubi supra*.

£74. 5s., and the respondent was ordered to pay the said sum to the petitioner within one week, and also to pay the costs of the suit.

1861.  
*Rolls.*  
THORNTON  
v.  
THORNTON.  
*Judgment.*

The second schedule to the order is headed thus:—"Second schedule, setting forth the particulars of the stock-in-trade of the said testator, on the premises at the time of his death, and which remained there up to the time of the death of his son George Thornton the younger."

The particulars of such stock-in-trade (or, more properly speaking, of the plant, together with their value) are then set forth, the value of the whole being £297; one-fourth of which sum is £74. 5s., which the respondent is by the order directed to pay to the petitioner. This said one-fourth is the one-half of the moiety of the stock-in-trade bequeathed to George Thornton the younger.

The notice of motion on behalf of the petitioner, by way of appeal against the said order, seeks to set aside so much of the order as contains the declarations which I have stated; and that, in lieu of such declarations, "It may be ordered and declared that, according to the true construction of the said will, the stock-in-trade on the premises so bequeathed to the said Edward and George Thornton the younger, and which existed therein at the time of the death of George Thornton the younger, was equally affected by the limitation over, on the death without issue of the said George Thornton the younger, as the premises themselves; and that it may also be declared that, on the death of the said George Thornton the younger without issue, one moiety of all the stock-in-trade which was, at the time of the death of the testator's said son George Thornton the younger, on the premises so bequeathed by the said will to said Edward and George Thornton the younger, became divisible between the petitioner and the respondent, in equal shares."

The effect of that declaration which I am required to make is, that the hides, soap and candles, which Edward and George Thornton had the absolute power to dispose of, should, so far as same were not disposed of, pass under the limitation over.

1861.  
*Rolls.*  
**THORNTON**  
*v.*  
**THORNTON.**  
*Judgment.*

The question whether the decretal order of the Master was right, and whether the Court is bound to make the declaration sought by the motion, depends on the construction to be put on the will of the testator, George Thornton the elder. The said testator carried on the trade and business of tanner and soap and candle manufacturer. The will bears date the 7th of August 1853.

The testator recites five leases of premises in the will mentioned, which were vested in the testator, and held for lives or long terms of years; and he recites a sixth lease of premises in the will mentioned, bearing date the 13th of January 1853, which he states that his son William (the petitioner) had procured to be executed to himself, and which the said William had refused to assign to the testator, which had displeased him much; and that, in consequence of such refusal, it was the testator's intention not to provide for the said William to the extent he had contemplated; and, after such recitals, the testator devised to his said son William the premises demised by the said lease of the 13th of January 1853, with the stores and other improvements erected and made thereon; and the will then proceeds in these words:—"And as to all the remainder of the leasehold property hereinbefore mentioned, and all buildings and improvements thereon, and *the stock-in-trade therein*, together with all the *stock-in-trade* which shall be on the premises so bequeathed to my son William, and all goods, chattels and effects whatsoever, moneys and securities for money, and all property of every description, whether real, freehold or personal, of what nature or kind soever, or wheresoever situate, and not hereby bequeathed as aforesaid, *which I shall die seised, possessed of or in any manner entitled to*, subject to the payment of my just debts, testamentary and funeral expenses, and to the legacies hereinafter bequeathed, and which I hereby expressly charge thereon, I leave and bequeath the same unto my sons Edward Thornton and George Thornton, share and share alike, to be held and enjoyed by them as tenants in common, and not as joint tenants." Now so far as I have read, of course, the term "*stock-in-trade therein*" applied to the stock-in-trade on the premises at the death of the testator. The will then

proceeds thus:—"And in case my said sons Edward and George, or either of them, shall die without leaving lawful issue him surviving, then and in such case it is my will, and I order and direct, that the share of such son, so dying, in the premises so comprised in said respective leases, and in the buildings and improvements erected and made thereon, *and in the stock-in-trade which shall be therein* at the time of such decease, shall go to and be divided, share and share alike, between such of my said sons as shall be then living, to be held and enjoyed by them as tenants in common, and not as joint tenants; and if but one such son shall be then living, then the entire to go to and be held and enjoyed by such one only surviving son." The testator then bequeathed legacies to his daughters, charged on the property devised to Edward and George Thornton; and the testator directed that the said legacies should not be called in without twelve months' notice, it being the testator's "desire that the working capital of my said sons should not be diminished or infringed upon too suddenly by such legacies, or either of them, being promptly demanded."

The testator appointed William Long and John Clarke his executors. The testator, George Thornton the elder, died, I believe, shortly after the date of his will, but Counsel did not state the date. Edward Thornton and George Thornton survived their father, and George Thornton the younger died unmarried and without issue, on the 19th of November 1856. It is said that George Thornton the younger made a will, but it has not been proved.

The question which arises is, what is the meaning of the words "the stock-in-trade which shall be therein," in the clause containing the devise over, in the event of Edward or George dying without leaving issue surviving?

The petitioner alleges that this devise over included not only the stock-in-trade which was the property of the testator, and which was still in existence at the death of George Thornton the younger, but that the bequest over passed what was not the property of the testator, i. e., the stock-in-trade which had been purchased or manufactured by George Thornton the younger, or Edward Thornton, and which had no existence at the testator's death.

1861.  
*Rolls.*  
THORNTON  
v.  
THORNTON.  
*Judgment.*



1861.  
*Rolls.*  
**THORNTON**  
*v.*  
**THORNTON.**  
*Judgment.*

The respondent contends, and the Master has decided, that the words in the devise over, of the "stock-in-trade which shall be therein," means, according to the heading of the second schedule to the order, "the stock-in-trade of the said testator on the premises at the time of his death, and which remained there up to the time of the death of his son George Thornton."

It is a well settled rule of construction that, in order to raise a case of election, the intention, as manifested by the will itself, must be clear and decisive; for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be, that he did not mean them to apply to that over which he had no disposing power: *Jarman on Wills*, 2nd ed., vol. 1, p. 379.

I do not think that this case involves any question of election; but I apprehend a testator is not to be assumed to devise property which does not belong to him.

In *Usticke v. Peters* (a), Vice-Chancellor Wood stated, "*Prima facie* the Court presumes, in all cases, that the testator has no intention to dispose, by his will, of lands of which he has not power so to dispose." In another passage of the judgment it is stated, "The general rule of Law is, that in sitting down to construe a will you are to assume, *prima facie*, that the testator did not intend to dispose of anything which was not his own to dispose of; and the circumstance of his having disclaimed such an intention will not make any difference, so far as the rule of construction is concerned." The cases on this subject are referred to in *Cosby v. Ash-town* (b), and in *Jarman on Wills*, 2nd ed., vol. 1, pp. 379, 380.

According to the argument of the petitioner's Counsel, if the share of George Thornton the younger, under his father's will, of the stock-in-trade, was, at his father's death, of the value of £1000, and, by the skill and exertions of the said George Thornton the younger, his share in the stock-in-trade, at the time of his death, was of the value of £100,000, the petitioner would be entitled to one-half of that sum. If George Thornton the younger had become a bankrupt, according to the argument of the petitioner's Counsel,

(a) 4 Kay & J. 453.

(b) 10 Ir. Chan. Rep. 227, 228, 229.

his assignees would have had no right to the stock-in-trade. If George Thornton the younger had retired from business, and sold all the stock-in-trade, including that which he had himself created, would the money for which he sold all his share in the stock-in-trade have been affected with a trust in favour of the petitioner, in the event of George Thornton the younger dying without leaving issue him surviving? If so, he could not have applied any part of the fund in advancing a child, because such child might die in his lifetime.

The ground on which it is sought to sustain the appeal is, that the bequest was on condition that the stock-in-trade which should be on the premises at the death of George Thornton the younger should go to the testator's other sons.

I do not think that such is the construction of the bequest; and, on the whole, I am of opinion that the Master was right in holding that the words "stock-in-trade therein," in the first bequest, and "stock-in-trade therein," in the bequest over, should have the same construction put upon them; and that the testator is not to be considered as having, in the bequest over, disposed of property not his own.

A question might have been raised, upon which, however, it is unnecessary to decide, as it has not been argued or suggested before the Master or before me. It is clear that Edward Thornton and George Thornton the younger were entitled to dispose of the stock-in-trade which was on the premises at the death of the testator, *i. e.*, the hides, soap, candles, &c., and also the stock-in-trade which should be thereafter on the premises. In case of a money fund, a bequest of what shall remain or be left at the decease of a prior legatee, or of what the legatee is possessed of at the time of his death, or of what remains undisposed of, and in many other cases of a similar nature, the bequest over is void for uncertainty. Several of the cases are referred to in *Jarman on Wills*, 2nd ed., vol. 1, p. 298.\* It might be contended that stock-in-trade such as hides and soap and candles would be subject to the same rule as a money fund, and for

1861.  
*Rolls.*  
THORNTON  
v.  
THORNTON.  
*Judgment.*

\* *Holmes v. Godson* (2 Jurist, N. S., p. 382), and *Barton v. Barton* (3 Kay and J., p. 512).

1861.  
*Rolls.*  
**THORNTON**  
*v.*  
**THORNTON.**  
*Judgment.*

the same reasons.\* Edward Thornton and George Thornton the younger were entitled to dispose of the entire stock-in-trade; and if so, the devise over was in effect of the stock-in-trade which should be undisposed of at the death of either, in case of his dying without leaving issue him surviving. The Master's decision gives the petitioner a share of the value of the plant which was still in existence at the death of George Thornton the younger; but the petitioner's argument is, that hides, soap, candles, &c., which Edward and George had an absolute power to dispose of, if not disposed of, passed under the devise over. It is difficult to understand this, having regard to the authorities. All, however, that it is necessary for me to decide is, that the declaration which the appellant seeks by his notice should not be made.

I shall refuse the motion with costs.

\* See *Watkins v. Williams* (3 M. & G., p. 629).

1860.  
*Nov. 3.*  
 1861.  
*Jan. 12.*

### ELLIOTT v. ELLIOTT.

A testator bequeathed to his four daughters unmarried a sum of £2000 each, on their day of marriage, with the consent of his trustees, with interest, by way of maintenance, in the meantime; and, if one of his said daughters should die without being married, he desired the fortune and legacies of her so being the first to die to go to and be divided equally among such of his married sons and daughters as might have issue at the death of such dying daughter. The four unmarried daughters survived the testator; and one of them died unmarried and without issue.—*Held*, that her legacy was divisible among the testator's sons and daughters who were married at the date of the will, and survived her, and had issue living at the time of her death.

THOMAS ELLIOTT made his will in 1833, by which he devised all his lands to trustees, in trust to permit and suffer his wife to have, hold and enjoy, during her life, the house and lands of Rathcoage, together with the plate, linen, &c., which should be at the testator's decease in the said house, or on the said lands, for the special purpose that his wife should have a residence, "for and with all my unmarried children, in case it be desirable to them to remain at Rathcoage." The will contained the following bequest:—"And whereas I am now possessed of a sum nearly of £10,000 in the new

and old  $\text{£}3\frac{1}{2}$  per cent. stock, and which I expect to add to, and have four daughters unmarried, Julia, Maria, Jane and Harriet, to each of them I purpose giving, as and for a marriage portion, a sum of  $\text{£}2000$  each: I leave and bequeath to my said trustees the said  $\text{£}3\frac{1}{2}$  per cent. stock, ready money, debts, and rents due to the last gale-day preceding my decease; and, in case the whole does not amount to  $\text{£}10,000$ , to be hereafter disposed of, I direct my son Charles to pay a sum of  $\text{£}1000$ , and my sons Samuel and Thomas to pay  $\text{£}500$  each, or more or less, in proportion, if necessary, as may be wanted to make up their sisters' fortunes. I direct  $\text{£}2000$ , part of the above  $\text{£}10,000$ , to be paid to Oliver Naylor, as and for my daughter Mary's fortune, which Naylor requested me to hold, and for which I paid  $\text{£}6$  per cent., during pleasure. I leave to my four daughters unmarried a sum of  $\text{£}2000$  each, being part of the residue of  $\text{£}10,000$ ; and I desire they may receive, from the day of my death, as and for the interest of their legacies, the interest due and accruing out of the said  $\text{£}3\frac{1}{2}$  per cent. stock, as and for their support and maintenance. I devise the said legacy or portion to each of my said daughters on their day of marriage, not sooner, provided she marries with the consent and advice of my said trustees; and, if one of my said daughters die without being married, I desire the fortune and legacy of her so being the first to die to go to, and be divided equally amongst, such of my married sons and daughters as may have issue living at the death of such dying daughter; and, in case one other or more daughters die unmarried, her or their fortune or legacy to go to, and be divided equally amongst, my four sons, Samuel, Thomas, Charles and William."

The testator died in 1839. At the date of the will he had twelve children. Charles, William, Julia, Maria, Jane and Harriet were unmarried at the date of the will. Samuel, Thomas, Catherine, Elizabeth, Mary and Sarah were married at the date of the will. Charles married after the testator's death, and had issue. William married after the testator's death, and died in the lifetime of Jane, without issue. Julia married the Rev. H. Johnston, during the testator's lifetime, and had issue at the death of Jane. Maria married Francis Freeman in the testator's lifetime, and had issue

1860.  
Rolls. =  
ELLIOTT  
v.  
ELLIOTT.  
—  
Statement.

1860.  
*Rolls.*  
 ELLIOTT  
 v.  
 ELLIOTT.  
 Statement.

at the death of Jane. Harriet also married during the testator's lifetime, but had no issue. Samuel survived Jane, and died in December 1858, leaving issue. Thomas, Catherine and Elizabeth had issue at the death of Jane. Mary died in the lifetime of the testator and of Jane, leaving issue. Sarah died in 1841, in the lifetime of Jane, leaving issue. Jane died in 1857, unmarried and without issue.

The petition was filed for the administration of the assets of the testator, and was referred to Master Litton, under the 15th section of the Chancery Regulation Act. The Master, by the final order of the 18th of June 1860, declared that the sum of £2000 bequeathed to Jane Elliott became, upon her death without issue, divisible in equal shares amongst such of the sons and daughters of the testator as were married at the date of the will, and survived Jane Elliott, and had issue at the time of her death, viz., Samuel Elliott, Thomas Elliott, Catherine Brownrigg and Elizabeth Walker.

Maria Freeman and Julia Johnston, and their husbands, appealed from the order. The executors of William Carey, who had survived his wife Sarah, also appealed.

Mr. *Robert R. Warren* and Mr. *Vance*, for Johnston and wife, and Freeman and wife.

*Argument.*

The gift of Jane's £2000 is contingent on her dying without issue, and is a gift to a class which was to be ascertained at the period of distribution (i. e., the death of Jane). All the sons and daughters who were married, and had issue at that period, are entitled to a share: 2 *Jarman on Wills*, p. 227; *Bouverie v. Bouverie* (a); *Ringrose v. Branham* (b); *Doe d. Burton v. White* (c). The description of the class who are to take is complex; the objects of it must be married and have issue. The effect of the Master's decision is to refer one part of the description (the marriage) to one period, the date of the will; and the other part of the description (having issue) to another

(a) 2 Phil. 349.

(b) 2 Cox, 384.

(c) 1 Exch. 526.

period, viz., the date of Jane's death: *Matchwick v. Cock* (a);  
1 *Roper on Legacies*, p. 30.

Mr. Serjeant *Lawson*, Mr. *Brewster*, Mr. *F. W. Walsh* and Mr. *S. Walker*, for different parties, in support of the order.

This is not a bequest to a class. Therefore, the principle and authorities relied on by the appellants, which are not disputed, do not apply. It is a bequest to individuals, under the description of "unmarried sons and daughters" who shall have issue at a particular period. The words are *designatio personarum*. The testator is referring to an actual existing state of things; and his words must, therefore, be referred to the date of the will, and not to the date of the death of Jane: 1 *Jarman on Wills*, p. 261; *Garratt v. Niblock* (b); *Beck v. Burn* (c); *Hethergill v. Harris* (d).

Mr. *Dix*, for the executor of William Carey, contended that the bequest was to a class to be ascertained at the death of the testator. Sarah Carey was then married, and had issue.

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THE MASTER OF THE ROLLS.

A motion has been made on the part of the Rev. Henniker Johnston and Julia his wife, and on the part of Francis Freeman and Maria his wife, by way of appeal from the decretal order of Edward Litton, Esq., the Master in this matter, dated the 16th and signed the 18th of June 1860, so far as the said order declares that, upon the true construction and effect of the will of the testator, Thomas Elliott, the sum of £2000, thereby bequeathed to Jane Elliott, became, upon her death, divisible in equal shares amongst such of the sons and daughters of the testator as were married at the date of the will of the said testator, and survived the said Jane Elliott, and had issue living at the time of the death of the said Jane Elliott, that is to say, Samuel Elliott, deceased, the respondent Thomas Elliott, Catherine Brownrigg, widow, and Elizabeth Walker, the wife of Alexander Walker. The appellants, the Rev. Henniker

1860.  
*Rolls.*  
ELLIOTT  
v.  
ELLIOTT.  
Argument.

1861.  
Jan. 12.  
Judgment.

(a) 3 Ves. 609.

(b) 1 R. & M. 629.

(c) 7 Beav. 492.

(d) 7 Beav. 49.

1861.  
*Rolls.*  
**ELLIOTT**  
*v.*  
**ELLIOTT.**  
*Judgment.*

Johnston and Julia Johnston his wife, and Francis Freeman and Maria Freeman his wife, contend that the £2000 should be divided into seven shares. Another motion by way of appeal has been served on the part of the executors of William Carey, who was the husband of Sarah Carey, to which I shall hereafter advert.

The will of Thomas Elliott bears date the 19th of January 1833. The testator by his will devised to trustees all his lands, on trust that they should, after the testator's decease, permit and suffer his wife, from and immediately after his decease, to have, hold and enjoy, during her life, his interest in the house and lands of Rathcoage, together with the plate, linen, china and all chattels which should, at the testator's decease, be in the said house or on the said lands, for the special purpose that his wife should have a residence "for and with all my unmarried children, in case it should be desirable to them to remain in Rathcoage." After a devise of Rathcoage, &c., after his wife's decease, this clause follows:—"And whereas I am now possessed of a sum nearly of £10,000 in the new and old £3½ per cent. stock, and which I expect to add to, and have four daughters unmarried, Julia, Maria, Jane and Harriet, to each of them I purpose giving, as a marriage portion, a sum of £2000 each; I leave and bequeath to my said trustees the said £3½ per cent stock, ready money, debts, and rents due to the last gale-day preceding my decease; and, in case the whole does not amount to £10,000, to be hereafter disposed of, I direct my son Charles to pay a sum of £1000, and my sons Samuel and Thomas to pay £500 each, or more or less, in proportion, if necessary, as may be wanted to make up their sisters' fortunes. I direct £2000, part of the above £10,000, to be paid to Oliver Naylor, as and for my daughter Mary's fortune, which Naylor requested me to hold, and for which I paid him £6 per cent., during pleasure. I leave to my four daughters unmarried a sum of £2000 each, being part of the residue of £10,000; and I desire they may receive, from the day of my death, as and for the interest of their legacies, the interest due and arising out of said £3½ per cent. stock, as and for their support and maintenance. I devise the said legacy or portion to each of my said daughters on their day of marriage, not sooner, provided she marries

with the consent and advice of my said trustees." And then follows this passage, on which the question arises:—"And, if one of my said daughters die without being married, I desire the fortune and legacy of her so being the first to die to go to, and be divided equally amongst, such of my married sons and daughters as may have issue living at the death of such dying daughter; and, in case one other or more daughters die unmarried, her or their fortune or legacy to go to, and be divided equally amongst, my four sons, Samuel, Thomas, Charles and William." The testator then devised to his four sons respectively, and their heirs, the lands in the said will mentioned.

The testator died in 1839. He had twelve children. With respect to the four daughters of the testator mentioned in his will as his unmarried daughters, Julia married in the testator's lifetime, but after the date of the will, the Rev. H. Johnston. Maria married Francis Freeman, in the testator's lifetime, but after the date of the will. It is alleged that the said Julia and Maria had issue living at the death of Jane Elliott. No evidence has been laid before me as to this; but the statement was not denied; and I assume that the fact is so. Julia and Maria, and their said respective husbands, are two of the appellants.

Jane Elliott died in January 1857, without ever having been married; and her £2000 (which is the sum in dispute) became distributable under the clause in the will which I have read. Harriet, the fourth of the daughters whom the testator in his will calls his unmarried daughters, was not married at the death of the testator, but did marry during the lifetime of her sister Jane; but she never had issue, and makes no claim. Samuel Elliott, a son of testator, was married at the date of the testator's will; and, having survived his said sister Jane, he died in December 1858, leaving issue, who were living at the death of the said Jane. The facts in relation to testator's son Thomas, and his daughters Catherine Brownrigg, widow, and Elizabeth, the wife of Alexander Walker, are the same, except that Thomas, Catherine and Elizabeth are alive; that is, they were married at the date of the will, and survived their sister, Jane Elliott, and had issue living at the death of the said Jane. The

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*Rolls.*  
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 ELLIOTT.  
 Judgment.

Master has decided that the said Samuel, Thomas, Catherine and Elizabeth were the parties entitled at Jane Elliott's death to her £2000. Charles was unmarried at the date of the will, and also at the death of the testator; but he married during the lifetime of his sister Jane, and had issue living at her death. The appellants Julia and Maria allege that he was entitled to a share. William, another son of the testator, was unmarried at the date of the will, and of the death of the testator, but married during the lifetime of his sister Jane, and died without issue during her lifetime. He, of course, had no claim. Mary Elliott, a daughter of the testator, was married, at the date of the will, to Oliver Naylor; and she died in the lifetime of her father and of said Jane, and left issue. She had no claim, having died in her father's lifetime. Sarah, another daughter of the testator, was married to William Carey, during the lifetime of the testator. It is alleged that there is some doubt whether she was married before or after the date of the will; but she must have been married before the date of the will, as the testator states, in his will, that he has four daughters unmarried, Julia, Maria, Jane and Harriet. From that statement I apprehend he could have had no other daughter then unmarried. Sarah died in the lifetime of the said Jane, leaving issue. The executors of William Carey have appealed.

If this be so, the state of the testator's family, at the time of making his will, was this: he had four daughters unmarried, Julia, Maria, Jane and Harriet, and he had two sons unmarried, Charles and William. He had four daughters married, Catherine, Elizabeth, Mary and Sarah, and two sons married, Samuel and Thomas. Mary died in the testator's lifetime, and the bequest to her lapsed. The Master has decided that the bequest over (which took effect by the death of Jane Elliott without being married, and, under which bequest over, Jane Elliott's £2000 was "to go to, and be divided equally amongst, such of my married sons and daughters as may leave issue living at the time of the death of such dying daughter"), became payable on the death of Jane Elliott, to such of the sons and daughters as were married at the date of the will, and who survived Jane Elliott, and had issue living at the time of the death of the said

Jane Elliott ; that is to say, Samuel Elliott, deceased, the respondent Thomas Elliott, Catherine Brownrigg, widow, and Elizabeth Walker, wife of Thomas Walker.

The said appellants Julia and Maria, and their husbands, admit that the said four sons and daughters, in the Master's order mentioned, were entitled to a share of the £2000, but they allege that the appellants Julia and Maria, and their brother Charles, are also entitled to a share of Jane Elliott's £2000, and that such sum should be divided into seven shares ; and they contend that the terms " my married sons and daughters," in the bequest over, include such sons and daughters as were not married at the date of the will, but who were married during the lifetime of the testator, or during the lifetime of the said Jane Elliott, and who survived the said Jane Elliott, and who had issue living at her death. Mary, who was married at the date of the will, having died in the testator's lifetime, the bequest to her, I apprehend, lapsed. A different question, to which I shall hereafter advert, arises as to Sarah.

It is said by the Counsel for the said appellants that, " Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may come into existence before the period of distribution : " 2 *Jarman on Wills*, p. 127. There is no doubt that the law is correctly laid down by Mr. *Jarman*, where there is a bequest to children as a class ; but the question here is, whether the testator, in bequeathing to his " married sons and daughters," in the clause in question (he having two sons and three daughters married at the date of his will), was bequeathing to a class, or whether he intended to designate certain of his sons and daughters answering the description when the will was made, and whether he is to be considered as referring to the state of circumstances as they existed at the date of his will, or as they might exist at the time of his death, or at the time of the death of the first of his four unmarried daughters who should die without being married ? The Master has decided that the bequest over was not to a class, but to persons sufficiently designated and described by the

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*Rolls.*  
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 ELLIOTT.  
 Judgment.

will. The case of *Bullock v. Bennett* (a), which was not referred to, appears to me to be an important case on the question which the Court has to decide. In that case a testator had a daughter who, at the date of his will, was a widow, she having been twice married, and both her husbands being dead. By his will (dated after the Wills Act came into operation), he gave a sum of stock, upon trust to pay the income to her for life, or until her marriage. She married, after the date of the will, a third husband, with the knowledge and approbation of the testator, who, however, died without re-publishing his will. It was held, by the Lords Justices of Appeal, that the daughter took no interest under it; and that the clause in the Wills Act, that the will is to be construed as if made immediately before the testator's death, relates only to the property comprised in the will. It is to be observed that, in the present case, the will of Thomas Elliott was executed before the statute; but the statute makes no alteration in the law in relation to the object of a gift: *Jarman on Wills*, 2nd ed., vol. 1, p. 266.

Lord Justice Turner, in giving judgment in the case of *Bullock v. Bennett*, said:—"Questions of this nature must depend upon the language and context of the instrument; and the point to be here ascertained is, whether the testator is referring to the state of circumstances as they existed at the date of the will, or as they might exist at the time of his death. I state advisedly that, in my judgment, this is the point, notwithstanding the late Wills Act, which, by its 24th section, enacts, that every will shall be construed with reference to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. It is with reference to the real and personal estate comprised in it that the will is to speak, as if executed immediately before the death of the testator. I understand this to mean, not with reference to the objects of the testator's bounty, who are to take the real and personal estate, but with reference to the real and personal estate, which is to be taken by those objects. Had it been intended otherwise, the words with reference to the real and personal estate would hardly, if at all, have been

(a) 7 De G., M. & G. 283.

required to be inserted. The statute, therefore, does not, in my opinion, affect the case, and we must consider the question on the language and context of the will. Now, according to the dispositions of the will, the trustees are to pay the income to the daughter, during her life, or until her marriage. It was present, therefore, to the testator's mind, when he made his will, that she was not at that time married; and he has made this more clear by ulterior dispositions, by which he has given the fund, after her decease or marriage, to the children of her first and second husbands. Are we then to understand a testator, who thus speaks of his legatee as not being married, to refer, when he speaks of her future marriage, not to her next marriage, if it should take place in his lifetime, but to any future and subsequent marriage which may take place after his decease? I think not; but that we must apply the words which the testator uses to what his will shows to have been passing in his mind at the time. He demonstrates that he was referring to the circumstances as they then stood, and we must apply his words to those circumstances."

Applying the principle of that case to the present, it appears to me that the testator was "referring to the state of circumstances as they existed at the date of the will." It was present to the testator's mind, when he made the will, that he had some children, four daughters and two sons unmarried, and four daughters and two sons married. It is perfectly clear that the testator, in using the terms "my four daughters unmarried," referred to the state of circumstances which existed at the date of the will; and what the Court is called upon, by the appellants Julia and Maria, and their husbands, to decide, is that, although such was the meaning of the terms "my four daughters unmarried," yet that the testator, when he used the terms "my married sons and daughters," did not refer to the state of circumstances as they existed when the will was made. The terms "unmarried" and "married" appear to have been used in contradistinction; and it would appear to me to be a strained construction to hold that, as to the former, the testator referred to the state of circumstances at the date of the will, and, as to the latter, the state of circumstances at a future period.

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*Rolls.*  
ELLIOTT  
v.  
ELLIOTT.  
*Judgment.*

1861.  
*Rolls.*  
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 ELLIOTT.  
*Judgment.*

The testator recites that he had "four daughters unmarried, Julia, Maria, Jane and Harriet." The term "unmarried" there relates to the date of the will. In a subsequent passage the testator leaves to each of his "four daughters unmarried a sum of £2000." There also the term "unmarried" refers to the date of the will. The will then directs that if one of the testator's daughters should die without being married, "I desire the fortune and legacy of her so being the first to die to go to, and be equally divided amongst, such of my married sons and daughters as may have issue living at the time of the death of such dying daughter." The question is, what is the meaning of the terms "my married sons and daughters" in that clause?

I think, on the whole, that the testator was, as Lord Justice Turner says, "referring to the state of circumstances as they existed at the date of the will," and that I should "apply the words which the testator uses to what his will shows to have been passing in his mind at the time. He was referring to the circumstances as they then stood, and we must apply his words to those circumstances." The natural meaning of the words "my married sons and daughters" is, his sons and daughters married at the time the testator was making his will. No doubt, their having issue at the death of Jane Elliott was a future event; but that does not show that the marriage was to be a future event. On the contrary, the testator understood the language which should be used when referring to a future event.

I am called on to insert words in the will, and to hold that "my married sons and daughters" means my sons and daughters now married, or who shall be married during the lifetime of such of my unmarried daughters who shall first die without being married.

I think that the observations of Lord Wensleydale, in *Gray v. Pearson* (a), are applicable to this case, and that the construction sought to be put on the will by the appellants is not in accordance with the grammatical and ordinary sense of the words.

Mr. *Jarman*, in his work on *Wills*, 2nd ed., vol. 1, p. 266, after observing that if a testator gave a sum of money to his son John,

(a) 6 H. of L. Cas. 106.

the gift will take effect in favour of a son of this name (if any), at the date of the will, and of him only; and that if such son should die in the testator's lifetime, and he should afterwards have another son of the same name, who should survive him, such after-born son would not be an object of the gift. He adds:— "And the same rule would seem to obtain if the devisee or legatee were described with reference to the filial character only, without any other designation, as in the case of a gift to *my son*, simply; which would apply, it is conceived, to the son (if any) living at the date of the will, to the exclusion of any after-born son, though such after-born son should, by reason of the decease of the then existing son, happen to be the only person answering the description at the death of the testator." If this be a correct statement of the law, the terms "*my married sons and daughters*" mean those who were married at the date of the will. The testator had two sons and two daughters married at the date of the will, to whom the description distinctly applied. It is not, however, necessary, in my opinion, to decide in this case whether the opinion of Mr. *Jarman*, as above stated, is correct, as, without reference to the point suggested by Mr. *Jarman*, I think the appeal is not sustainable.

There is some difficulty on the question raised by the appeal of the respondents Henniker Johnston and Julia his wife, and of Francis Freeman and Maria his wife; but, on the whole, I am of opinion that the Master was right, so far as their appeal is concerned; and that Julia and Maria did not take under the will both as unmarried daughters and as married daughters.

With respect to the appeal of the executors of J. Carey, the late husband of Sarah Caréy, deceased, there is a formal objection to that appeal, as the *chose in action* of the wife belongs to the husband surviving, as her administrator, and the executors of her husband are not entitled. That objection, however, could be removed by taking out administration to her.

As to the substantial question in the case raised by the appeal of the executors of J. Carey, it is said that it is doubtful whether or not Sarah Carey was married at the date of the will. That fact must be ascertained before I decide on the claim. I apprehend she

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*Judgment.*

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Judgment.

must have been married at the date of the will, from the reference by the testator to his four unmarried daughters, Julia, Maria, Jane and Harriet.

The question as to Sarah has not been satisfactorily argued, and I must hear one Counsel on each side on that claim; first, as to the fact whether she was married at the date of the will; and, if so, secondly, was she entitled to a share under the will.

Jan. 18.  
Argument.

Mr. *Dix* stated that Sarah Carey was married at the date of the will, and that administration would be taken out to her. He contended that all the sons and daughters who answered the description at the testator's death took vested interests: 1 *Jar.* p. 683; *Duffield v. Duffield* (a); *Benyon v. Maddison* (b); *Lees v. Massy* (c); *Arrow-smith's Trust* (d); *Wharton v. Barker* (e).

Mr. Serjeant *Lawson*, contra.

Sarah, having having died before Jane, was not entitled to any part of the £2000; the gift being to persons who were alive and had issue at the death of Jane: 1 *Rep.*, p. 588; *Leake v. Robinson* (f); *Kirkman's Trusts* (g).

Judgment.

The MASTER OF THE ROLLS refused the motion of the executors of W. Carey, stating that the authorities cited by Mr. Serjeant *Lawson* appeared to establish that the decision of the Master was right.

(a) 3 Bligh, N. S., 261.

(b) 2 Br. C. C. 75.

(c) 6 Jur., N. S., 2.

(d) 7 Jur. 9.

(e) 4 K. & J. 483.

(f) 2 Mer. 363.

(g) 3 De G. & J. 558.

1860.  
*Rolls.*

FOWLER v. LIGHTBURNE.

Nov. 16, 17.  
1861.  
Jan. 12.

THE petition was filed for the specific performance of two agreements for the sale of certain lands of Ardnamore, Fordstown and Little Fordstown; and the principal question in the case was, whether Stafford Lightburne, the heir-at-law of Joseph Lightburne, the vendor, who was dead, was a necessary party to the conveyance? It was alleged by the petitioner that the legal estate had descended to Stafford Lightburne, on the death of his father Joseph Lightburne. The respondent Penelope Lightburne, who was the widow and devisee of Joseph Lightburne, contended that the legal fee had been conveyed, by Joseph Lightburne, to the trustees of a certain settlement of the 22nd of January 1810. The question, therefore, turned entirely on the construction of that deed, which is sufficiently stated by his Honor, *infra*, p. 497.

Mr. Brewster, Mr. Norman and Mr. Warren, for the petitioner, argued that the trustees of the settlement only took the legal estate for the life of Penelope Lightburne; and that the purchaser was entitled to a conveyance of the entire fee, both legal and equitable: *Beaumont v. The Marquis of Salisbury* (a); *Curtis v. Price* (b); *Wickham v. Wickham* (c); *James v. Bion* (d); *Owen v. Flack* (e); *Parkin v. Thorold* (f); *Roberts v. Marchant* (g).

The Attorney-General, Mr. Serjeant Sullivan and Mr. Palles, for the respondent, relied on *Lord St. Leonards on Ven. & Pur.*,

that the heir-at-law of A was not a necessary party to the conveyance, as he had no legal estate in the lands, and no equitable estate, and no right to institute a suit to set aside the contract, having regard to the will of A, devising all his property to his wife, who, if the contract was set aside, would be entitled to the lands; and, if the contract was not set aside, would be entitled to the purchase-money.—[*Roberts v. Marchant* explained.]

A, seised in fee, conveyed lands to B and C, and the survivor of them, and the heirs of the survivor, to the use of A for life, and, after his decease, to the use of B and C, and the survivor, and the heirs of such survivor, upon trust to permit and suffer D to receive a jointure, and, after the death of D, then to the use of the right heirs of A.—*Held*, that B and C took a legal estate in fee in remainder.

A, having made a will, devising all his property to his wife, and having contracted to sell the lands, and afterwards died:—*Held*, in a suit for specific performance by the purchaser,

(a) 19 Beav. 198.

(b) 12 Ves. 89.

(c) 19 Ves. 419.

(d) 3 Swanst. 234.

(e) 2 Sim. & St. 600.

(f) 16 Beav. 59.

(g) 1 Ph. 370.



1860.  
*Rolls.*  
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p. 157; *Curre v. Bowyer* (a); *Lewis v. Rees* (b); *Colmore v. Tyndall* (c); *Williams v. Waters* (d); *M'Culloch v. Gregory* (e); *Radford v. Southern* (f); *Down v. Down* (g); *Roe v. Lidwell* (h); *Jack v. M'Intyre* (i); *Nott v. Riccard* (k); *Sheph. Touch.*, p. 248; *Roll. Ab.*, p. 54, pl. 26; *Vicars Choral v. Ayres* (l); *Lyle v. Earl of Yarborough* (m); *Parr v. Lovegrove* (n).

1861.  
 Jan. 12.

#### THE MASTER OF THE ROLLS.

This is a suit for the specific performance of two agreements entered into between Joseph Lightburne, deceased, and Penelope Lightburne, his wife (who is one of the respondents), of the one part, and the petitioner, of the other part, for the purchase, by the petitioner, from the said Joseph Lightburne, of certain lands therein respectively mentioned.

The first of those agreements bears date the 13th of August 1840, and the second agreement bears date the 22nd of August 1842. Penelope Lightburne joined in the agreements, in order to bar any right to jointure or dower, and she executed the agreements under the statute, having been first duly examined. It is admitted that the petitioner is entitled to a decree for a specific performance of both the agreements; and the only question is a question as to how the costs of the suit should be disposed of; the petitioner contending that Stafford Lightburne, who has been made a respondent, and who is the heir-at-law of Joseph Lightburne, is a necessary party to the conveyance to be executed to the petitioner; and the respondent Penelope Lightburne having insisted that Stafford Lightburne was not a necessary party, and that she was not bound to have had the conveyance executed by him.

The facts of the case, so far as they are material, are as fol-

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| (a) 5 Beav. 6, n.      | (b) 3 K. & J. 132.           |
| (c) 2 Y. & J. 622.     | (d) 14 M. & W. 166.          |
| (e) 3 K. & J. 12.      | (f) 1 M. & Sel. 299.         |
| (g) 7 Taunt. 343.      | (h) 9 Ir. Com. Law Rep. 184. |
| (i) 12 Cl. & Fin. 151. | (k) 22 Beav. 307.            |
| (l) Sir W. Jones, 435. | (m) 1 John. 70.              |

(n) 4 Jur., N. S., 600.

low:—A settlement was executed on the marriage of Joseph Lightburne with the respondent Penelope Lightburne, which bears date the 22nd of January 1810. By the terms of that deed, the lands thereby settled (which I am of opinion included Little Fordstown, notwithstanding the mistake as to the acreage\*) were conveyed to Arthur Meadows and John Emerson (the trustees), and the survivor of them, and the heirs of the survivor, to the use of Joseph Lightburne for life, and, after his decease, “to the use of the said Arthur Meadows and John Emerson, and the survivor of them, and the heirs of such survivor,” upon trust to permit and suffer the said Penelope to receive the sum therein mentioned for her jointure, and, after the death of the said Penelope, then to the use and behoof of “the right heirs of the said Joseph Lightburne for ever.” Under the provisions of that deed, the legal estate in remainder, after the death of Joseph Lightburne, was, in my opinion, in the trustees. It is admitted that the language of the deed is sufficient to give the legal estate to the trustees after the death of Joseph Lightburne, the limitation being to the use of the trustees, &c. But it is said that it was the intention of the parties to the deed to restrict the estate in the trustees to an estate *pur auter vie*, i.e., for the life of the respondent Penelope Lightburne; and that, if the intention be clear, it must prevail. There is, however, nothing in this case to show an intention to cut down the estate in the trustees to an estate *pur auter vie*.

If the estate was so cut down, and the jointure of Penelope Lightburne was in arrear at her death (supposing that she had not given up her claim to such jointure as hereinafter mentioned), in such case it would have been necessary, for adequately securing the payment of such arrear, that the estate in the trustees should continue after her death. This subject has been fully considered in the case of *Lewis v. Rees (a)*. In that case, there was a limitation in a deed to trustees and their heirs, without words restricting it to the lives of preceding tenants for life, upon trust to preserve contingent remainders; and it was held that, although the omission of

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(a) 3 Kay & J. 132.

\* Shep. Touch. 248.

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*Rolls.*  
 FOWLER  
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 LIGHTBURNE.  
 Judgment.

such words was probably an oversight, yet, the instrument being a deed, the Court could not construe the limitation as restricted, notwithstanding an estate in fee was a larger estate than was required for the purposes of the trust, and the limitation was repeated in a subsequent part of the deed, and was followed by a term of years in a third party, upon trust to raise portions, and by a power to the tenants for life to grant leases; and it was further held that, in order to justify the Court in restricting such limitation by deed to an estate *pur autre vie*, it must be shown that the intention of the parties, as manifested by the deed, cannot be carried into effect, unless the limitation be so restricted. The distinction between deeds and wills was adverted to in the case. All the authorities were considered and commented upon by Vice-Chancellor Wood, in his very able judgment; and that case appears to me to be a clear authority to establish that the legal estate in fee in remainder was and is in the trustees in the settlement of 1810. A mortgage in fee was subsequently executed by Joseph Lightburne to James M'Evoy, of the lands afterwards contracted to be sold to the petitioner, by the articles of agreement of the 10th of August 1840; and a mortgage for one hundred years was executed by the said Joseph Lightburne, of the lands of Little Fordstown, to the said James M'Evoy. The lands of Little Fordstown were the subject of the agreement of the 22nd of August 1842. I am of opinion (as I have already stated), on the authority of *Lewis v. Rees*, that the legal estate in fee in the lands in both mortgages was outstanding in the trustees of the settlement of 1810 at the time the mortgages were executed. If not, so far as the lands of Little Fordstown were concerned, the legal estate, subject to the term of one hundred years, would have remained in Joseph Lightburne. By the first of the agreements, dated the 10th of August 1840, the specific performance of which is sought in this suit, and made between the said Joseph Lightburne and Penelope his wife, of the one part, and the petitioner, of the other part (the said Penelope having executed the agreement under the statute, after having been examined, and with the view of releasing any claim for dower or jointure), the said parties of the first part agreed to sell to the petitioner the lands of Fordstown, described in the agreement, and the lands of Ardanew,

for the sum of £1006. 6s. 4d. (to be paid in the manner and at the time in said agreement mentioned), subject to certain leases, and to the said mortgage of the fee to James M'Evoy; and Joseph Lightburne covenanted, within six months after the death of Mrs. D. Ormsby, at the expense of the said J. Lightburne, to deduce a clear title, to the satisfaction of the Counsel and solicitor of the petitioner, in the usual way.

The second agreement, the specific performance of which is sought, bears date the 22nd of August 1842, and was made between the said Joseph Lightburne and Penelope his wife, of the first part, and the petitioner, of the second part; and the said parties of the first part thereby agreed to sell the lands of Little Fordstown to the petitioner, for the consideration therein mentioned, subject to certain leases, and to the mortgage for one hundred years, granted to the said James M'Evoy; and the said agreement contained a similar covenant as in the first agreement, as to making out title within six months after the death of Mrs. D. Ormsby. The agreement of the 22nd of August 1842 was also executed under the statute by Penelope Lightburne, she having been duly examined. Mrs. D. Ormsby died in December 1858. The petitioner having paid off the mortgages on Little Fordstown, the mortgage was assigned to a trustee for him.

Joseph Lightburne, by his will, dated the 30th of May 1835, devised certain property therein mentioned to his wife, the said Penelope, and thereby devised all his other property, except his gold watch, to the said Penelope Lightburne, upon the special trust and confidence to have and enjoy the same during her natural life, and to support and provide for certain of their younger children therein named; and to distribute the same amongst them in equal shares and proportions after her decease, or at any time previous thereto that she might think proper. The testator then bequeathed his gold watch to one of his younger children; and the will contains this clause: "and as my eldest son Stafford is not in affluent circumstances, if my dear wife could spare him £50 or £100 at my decease, I am sure she will do so; but this is only a recommendation, and not a devise." The testator then appointed his said wife Penelope his sole executrix. The testator made a codicil to his will, altering

1861.  
*Rolls.*  
FOWLER  
v.  
LIGHTBURNE.  
*Judgment.*

1861.  
*Rolls.*  
 FOWLER  
 v.  
 LIGHTBURNE.  
 Judgment.

in some respects the provisions in the will; and it concludes thus, "and if my dear wife can, I am sure she will give my four sons Stafford, Harcourt and Joseph and Henry £100 each." Probate was granted to the said Penelope.

Thus it will appear (if the construction which I put on the settlement of 1810 be correct, and the legal estate in fee was vested in the trustees in said settlement) that all that Joseph Lightburne contracted, or could have contracted, to sell to the petitioner, by the articles of agreement of 1840 and 1842, was an equitable estate in fee. By the will of Joseph Lightburne, he bequeathed away all his property from Stafford Lightburne, his heir-at-law, unless so far as the codicil, if binding, entitled him to £100. I do not, therefore, see what estate or interest Stafford Lightburne had in the lands. The effect of the will was to entitle Penelope Lightburne to the purchase-money, which the petitioner contracted by the articles of agreement to pay. I apprehend that Stafford Lightburne could not (having regard to the will and codicil) have filed a cause petition or bill to set aside the contracts sought to be specifically enforced; and if not, and if he has no legal estate, I cannot see on what ground he was a necessary party to the conveyance to the petitioner. The case of *Roberts v. Marchant* (a), which has been strongly relied on by the petitioner's Counsel, does not apply; for in that case the vendor died intestate, and the heir-at-law was a necessary party to the suit filed by the administrator of the vendor against the purchaser, for a specific performance of the contract; as the heir-at-law of a vendor who dies intestate might dispute the validity of the contract: but I apprehend that, in the present case, Stafford Lightburne could not dispute the validity of the articles of agreement of 1840 and 1842, having regard to the will of Joseph Lightburne, and having no interest whatever in disputing those articles. If the contracts were set aside, Stafford Lightburne would not be entitled to the estate, at Law or in Equity; and if not, having no interest in setting aside a contract, he could not take any proceeding for that purpose.

If Stafford Lightburne has neither a legal estate nor an equitable

(a) 1 Hare, 547; S. C., 1 Phil. 370.

estate, nor a right to file a bill or cause petition to set aside the contracts, for what purpose was he to be a party to the conveyance? A purchaser is not entitled to have a will proved against an heir-at-law, unless there is some reasonable ground for disputing its validity: *McCulloch v. Gregory* (a).

Stafford Lightburne, being a party to the suit, will be bound thereby. But I am of opinion, for the reasons which I have stated, that the respondent Penelope Lightburne was not bound to have the conveyance to the petitioner executed by Stafford Lightburne; and, if I am right in that opinion, the petitioner is not entitled to the costs of the suit as against Penelope Lightburne. There is, however, some difficulty on the question, whether Little Fordstown passed to the trustees under the deed of 1810, having regard to the mistake in the acreage; and if Little Fordstown did not pass under the deed of 1810, the legal estate in Little Fordstown, subject to the mortgage for one hundred years, would be in Stafford Lightburne: in which case he would, I apprehend, have been a necessary party to the conveyance, in respect of such legal estate.

Having regard, therefore, to the doubt on this point, and, as there is some apparent conflict in the authorities referred to in *Lewis v. Rees*, I shall not give costs against the respondent Penelope. Each party will abide their own costs.

I shall make a decree for a specific performance of both agreements; and let each party abide their own costs. As to the exact terms of the decree, the question has not been argued. The respondent claims interest on the purchase-money; but I do not know who has been in receipt of the rents. If the parties wish to avoid the expense of a reference, they can agree as to the sum to be paid by the petitioner. This will not affect the right of the petitioner to appeal on the question of Law, if he shall be so advised.

It was stated, during the argument, that the petitioner was a trustee, and on that account was bound to see that he obtained a good title; and he will of course be entitled to be paid his costs out of the trust property, as the suit was a *bona fide* suit.

(a) 3 K. & J. 12.

1861.  
Rolls.  
FOWLER  
v.  
LIGHTBURNES.  
Judgment.

1860.

*Rolls.*

Dec. 6, 7.

1861.

Feb. 7.

April 17.

## ORR v. LITTLEWOOD.

The contributions to renewal fines of the tenant of a College lease, and his sub-tenant, with a *toties quoties* covenant for renewal, are in proportion to the annual value of their respective interests.

In calculating the value, the rent payable by each is to be deducted.

If there were buildings on the land at the date of the sub-lease, they are to be taken into account in ascertaining the value.

*Quere*—If the buildings have been afterwards erected?

*Statement.*

A DECREE was made on the 5th of November 1858, declaring the petitioner entitled to a renewal of a lease of the 30th of October 1821, of certain premises in Townsend-street, in the city of Dublin; and it was thereby referred to the Master to inquire and report the amount of fines and interest due on the renewal, in case the petitioner and the respondent H. Littlewood should differ about the same.\* A renewal of the lease was executed by the College to the respondent Littlewood, on the 8th of January 1858; and the petitioner, after the decree, assigned his interest in the said lease of the 30th of October 1821 to the respondent Alford. The Master made his report of the 5th of November 1860, which was afterwards amended, in pursuance of an order of the 7th of December 1860. He found the present value of the interest of the respondent Alford to be £6. 7s. 8d., and the present value of the interest of the respondent Littlewood to be £274. 13s. 1d.; and that E. Alford should pay the proportional part of the entire renewal fines according to those two values, with interest from the time of the payment of the renewal fines to the College, on his several proportions, at the rate of £5 per cent. The respondent Littlewood took three exceptions to the report; first, that the value should have been calculated irrespectively of the rents payable thereout; secondly, that the value should have been taken of the premises as building ground, irrespectively of the buildings afterwards erected thereon; thirdly, that the contribution should have been ascertained by reference to the acreage. The findings in the Master's report, the mode in which he calculated the value, and the exceptions, are stated at length in his Honor's judgment.

\* See 8 Ir. Chan. Rep. 348, where, in the statement, the date of the lease is erroneously stated to be 1850, instead of 1821.

Mr. Serjeant *Sullivan* and Mr. *Gamble*, in support of the exceptions.

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*Rolls.*

ORR  
v.

Mr. Serjeant *Lawson*, Mr. *F. W. Walsh* and Mr. *Purcell*, for *LITTLEWOOD*, Alford, and in support of the Master's report.

Argument.

*Molony v. Scollard (a)*; *Davis v. Hone (b)*; *Frankfort v. Thorpe (c)*; *Jones v. Jones (d)*; *Charlton v. Driver (e)*; 14 & 15 Vic., c. 128, s. 7 (Private Act), were referred to.

THE MASTER OF THE ROLLS.

1861.  
April 17.  
Judgment.

This case has been brought before the Court on exceptions to the Master's report. The suit in this case was for the renewal of two leases, both of which bear date the 30th of October 1821. The cause was heard before me on the 5th of November 1858, and I made a decretal order on that day, whereby the petition was dismissed, so far as it prayed a renewal of the lease of the 30th of October 1821, first mentioned in the petition, and which expired on the 25th of March 1857; and it was further ordered and declared that the petitioner was entitled to a renewal of the second lease, in the petition mentioned, and which also bore date the 30th of October 1821, but which would not expire until the 25th of March 1859; and the order (having directed the petitioner to pay to the respondent Littlewood the costs of the suit up to the date of the decretal order, including the costs of the hearing) further ordered, in the event of the petitioner and the respondent H. Littlewood differing about the amount of the renewal fines and interest payable on the said last-mentioned lease, that it should be referred to W. Brooke, Esq., the Master in rotation, to ascertain the amount of renewal fines and interest payable to the said respondent, and also to settle the deed of renewal, in case the parties should differ about the same; and the Court reserved the question of the costs to be incurred before the Master, in case the parties differed about the amount of the renewal fines, &c. This case is reported in 8 *Ir. Chan. Rep.*,

(a) 12 *Ir. Eq. Rep.* 93.

(b) 2 *Sch. & Lef.* 340.

(c) 2 *Ball & B.* 372.

(d) 5 *Hare*, 461.

(e) 2 *Br. & Bing.* 345.



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*Rolls.*  
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p. 348, where the facts are fully stated. The report made under the said decretal order was filed on the 5th of November 1860; and the cause came on to be heard, on exceptions to the report, on the 7th of December 1860; and, it being impossible to dispose of the case satisfactorily, in consequence of no schedule having been annexed to the report, showing how the sums were calculated, an order was then made, giving liberty to amend the report on the file, and add a schedule thereto, showing the mode in which the amount of the renewal fines, &c., was calculated; and also giving liberty to the respondent to file exceptions to the report when amended, instead of those then filed, each party to file affidavits, if so advised; and the case was ordered to stand until Hilary Term 1861. Exceptions have accordingly been filed to the report, which was amended, in pursuance of the said order; and it is only necessary to adjudicate on those exceptions.

The Master, by his said report, found that the petitioner had, by indenture, dated the 1st of July 1859, assigned his interest in the premises demised by the indenture of the 30th of October 1821 (which were the subject-matter of the reference) to the respondent Edward Alford, and that, after the said assignment, the petitioner ceased to appear on the reference, which was carried on between the two respondents Edward Alford and H. Littlewood; and the report then proceeds thus:—"I have, in order to ascertain the amount of renewal fines payable by the said respondent E. Alford, inquired into the present value of the interest of the respondent H. Littlewood, in the piece of ground and premises comprised in the renewal of the 8th of January 1858, and also the present value of the interest of the said Edward Alford, in the premises comprised in the lease of the 30th of October 1821, a renewal of which it is proposed to take; and in ascertaining the respective values or interests of the said respondents in said premises respectively, I have acted upon the valuation made by Messrs. Brassingtons & Gale; the particulars of which, and the mode of calculation, appear in the first schedule hereto annexed; and I find that the interest of the said respondent H. Littlewood, in respect of the premises comprised in his renewal of the 8th of January 1858, is £274. 13s. 1d. yearly;

and the interest of the said E. Alford in the premises, a renewal of which is sought, is £6. 7s. 8d. yearly; and that the said E. Alford is to pay the proportionate part of the entire renewal fine, according to these two values, with interest from the time of the payment of the renewal fines to the College, on his several proportions of said renewal fines, at the rate of £5 per cent. per annum." The report then finds that the respondent H. Littlewood paid to the College, in the years 1839, 1844 and 1858, the several sums set forth in the second schedule to the report, as and for the renewal fines, in respect of the premises comprised in the said renewal of the 8th of January 1858; and the report then finds that the Master, acting on the principle above stated, calculated the proportionate part of the said fines so paid by the said H. Littlewood, to which the said E. Alford is liable, in respect of the said premises; and the report finds that same amounts in all to £9. 19s. 4d., the particulars of which are stated in the third schedule, and which, with interest, amounts, as in said schedule mentioned, to £16. 13s. 3d.; and that said sum is now payable by the said E. Alford, as his proportion of the said renewal fines on obtaining said renewal. The first schedule to the report finds the gross annual value of the premises in E. Alford's possession as £56. The Master (acting on the valuation of Messrs. Brassingtons and Gale) deducts from that gross value the rent of £49. 12s. 4d., payable by E. Alford to H. Littlewood, and the net annual interest of E. Alford, in the portion of the premises in his possession, is there stated as £6. 7s. 8d.

The schedule then finds the gross annual value of the premises in the possession of H. Littlewood and his undertenants, excluding the part in E. Alford's possession, to be £275. To that is added £49. 12s. 4d., the rent payable by E. Alford to H. Littlewood. That makes the gross annual interest of H. Littlewood, in respect of the entire premises, £324. 12s. 4d. The schedule then deducts £49. 19s. 3d., being the head-rent payable by H. Littlewood to Trinity College; and the net annual interest of the respondent Littlewood, in the entire of the premises, in the renewal from the College, is then stated as £274. 13s. 1d. The second schedule sets forth the sums paid by H. Littlewood to the College, for

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*Judgment.*

renewal fines, in respect of all the premises in the head lease; and the third schedule finds the proportionate part of the fines, with interest, payable by E. Alford, to be £16. 3s. 3d.; the accuracy of that finding depending, of course, on the question whether the first schedule correctly finds the net annual interest of H. Littlewood, in all the premises, to be £274. 15s. 1d., and the net annual interest of E. Alford, in the portion of the premises of which he seeks the renewal, to be £6. 7s. 8d. The *toties quoties* covenant in the lease of the 30th of October 1821 is stated at length in the report, 8 *Ir. Chan. Rep.*, pp. 351, 352. What E. Alford is bound, under the covenant, to pay, is "a proportionate part of whatever fine he the said H. Littlewood (who is the assignee of Drury Jones) shall pay, on obtaining a renewal or new lease of the premises hereby demised (amongst others), from the person under whom he holds the same."

In Mr. *Lyne's* work on *Church Leases*, p. 134, he states:—"Where the covenant for renewal provides, in general terms, that the undertenant shall pay a proportionable part of the fine payable by the immediate tenant of the See, without specifying how that proportion is to be ascertained, it has been questioned whether the interest of the latter is to be included in the estimate of the proportion, or whether the contribution is to be in the nature of an acreable assessment, so that, if the whole land were in the possession of undertenants, with *toties quoties* covenants, they would pay the whole fine, and nothing would remain to be contributed by the landlord. It is the general opinion that, in such a case, the landlord (*i.e.*, the immediate tenant of the Church) should be rated for his proportion according to the value of his interest; and it is said to have been so decided in a case before Lord Manners."

The first of the amended exceptions taken by H. Littlewood states that the Master has inquired into the present value of the interest of H. Littlewood and E. Alford; and has deducted the amount of rent payable by each: whereas the Master ought not (as Mr. Littlewood contends) to have deducted the amount of such rents, but should have found the value irrespective of said rents payable thereout; and that the proportionate part of the

finer payable by E. Alford should be £74, calculated as in the schedule to the exception.

The second exception insists that, according to the true meaning of the covenant, the fine for renewal of the sub-lease should be estimated by comparing the value of the plot of ground so sub-demised, with the value of the entire plot of ground, considering each as building ground, irrespective of the buildings that have been or might be afterwards erected thereon.

The third exception is that the Master should have found that the amount of the fines should be estimated according to the proportion which the acreable contents of the part sub-demised bore to the entire.

With respect to the second and third exceptions, I am of opinion that they are unsustainable; and that, under such a *toties quoties* covenant as there was in the lease of the 30th of October 1821, the contributions of sub-tenants to renewal fines are to be calculated according to the proportion which the annual value of the lands comprised in the sub-lease bears to the annual value of the lands comprised in the original lease.

I had to consider the subject in the case of *Molony v. Scollard (a)*, and Mr. Serjeant Warren argued the exceptions in that case, which I overruled, and there was no appeal. With respect to the second exception, the Private Act of the 14 & 15 Vic., c. 128, which has been referred to, does not apply to the city of Dublin. If lands were not built upon at the time of a sub-lease, it might be an arguable proposition that, under the *toties quoties* covenant, the proportionate part of the fine was to be calculated according to the value of the lands, irrespective of the buildings afterwards erected thereon; but that is not the point raised by the second exception. The premises appear, from the lease of the 30th of October 1821, to have been then built upon; and if the proportionate part of the fine is to be calculated according to the proportion which the annual value of the lands comprised in the sub-lease bears to the annual value of the entire lands comprised in the original lease, I do not understand on what principle you are

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(a) 12 Ir. Eq. Rep. 93.

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to exclude from the calculation of value buildings which were upon the premises at the time of the sub-lease, and are still upon the premises. If there are two plots of grounds, of which separate sub-leases are made to different persons, and such plots of ground, if not built upon, would be of equal value, but both plots were built upon at the time of the sub-lease, and one of the plots with the buildings thereon was and is double the value of the other plot with the buildings thereon, according to the second exception, the same proportion of renewal fine would be payable by each sub-tenant.

As to the third exception, if there are two sub-leases of twenty acres each, of part of the lands in an original lease, and the *toties quoties* covenants in the sub-leases are in the terms of the covenant in this case, according to the third exception, the same proportion of fine would be paid by each sub-tenant, although the one sub-lease may have been of some marshy, unprofitable land, and the lands demised by the second sub-lease may have been, and may be, of double the value. The second and third exceptions appear to me to be wholly untenable, and must be overruled with costs.

With respect to the first exception, which raises the question whether, in estimating the annual value of the premises in the sub-lease, and the annual value of the entire of the premises comprised in the head lease, the rent is, in each case, to be deducted from the gross value, I should be very slow to come to a different conclusion from the Master, his opinion having been founded on the calculation of the eminent firm of Brasingtons & Gale. If there were two adjoining plots of ground built upon, and demised by two sub-leases to different persons, and they were of equal value, if the amount of rent payable by each was not taken into account, according to the first exception, the same proportion of renewal fine should be paid by each sub-tenant, although the rent reserved on one lease was double the rent reserved on the other. I do not understand that principle, if annual value is to be the criterion of the proportion of fine to be paid. It has been stated by Counsel that the rent

was not deducted in *Molony v. Scollard*. I do not know how that is; but no such point was raised by the exceptions in *Molony v. Scollard*, or was argued before me. The affidavits which have been made, and the opinions of Mr. Nun, Mr. Greene and Messrs. M'Causland and Fetherston, do not throw much light upon the question.

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There is a point which might have been raised in this case, but is not raised by any of the exceptions, and has not been adverted to or argued by Counsel. In *Molony v. Scollard (a)*, the Master, by his report, found the value at the date of the last renewal from Trinity College, and not at the date of the report. In this case the annual value was ascertained as of the date of the report. The last renewal from the College, in the present case, was on the 8th of January 1858; and, therefore, it probably would have made no difference in the calculation if the value at that date had been ascertained. It is not necessary for me to offer any opinion whether the value, under the covenant in the lease of the 30th of October 1821, should have been ascertained as of the date of the lease of the 30th of October 1821, or on the 8th of January 1858, when the last renewal of the head lease was taken out, or at the date of the report, no such point being raised by any of the exceptions.\*

I shall overrule the exceptions with costs; and direct the respondent Mr. Littlewood to execute the renewal settled by the Master, and to pay the costs incurred before the Master, and of this hearing.

(a) 12 If. Eq. Rep. 95.

\* See *Stocken v. Dawson* (2 Phil. 141).

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Rolls.

Dec. 7.

1861.

Feb. 7.

April 19.

## RICE v. O'CONNOR.

Lands were conveyed by a registered deed to a purchaser, subject to "existing leases and lettings made to the undertenants" of the vendor.—  
*Held*, that a parol contract for a lease, with part performance of which the purchaser had no notice, was not an existing lease or letting within the meaning of the deed.

*Semble*—A contract by the vendor, duly signed, according to the Statute of Frauds, would be an existing lease or letting, within the meaning of the deed, and binding on the purchaser. The distinction between equitable estates and equitable rights considered.

In a suit for specific performance of a contract relating to lands, the documents relied on to prove the contract must be put in issue specifically by the petition.

*Semble*—Part performance of a contract is not binding on a purchaser for valuable consideration without notice.

THE petition was filed for the specific performance of a contract for a lease of lands in Kerry, alleged to have been entered into on the 25th of April 1850, by Howard Holland, who was the bailiff of Mr. Robert Bayly, the then owner of the lands. The respondent was the purchaser of the lands from Mr. Robert Bayly, under a registered conveyance of the 24th of March 1858, by which they were conveyed to him, "subject to the existing leases and lettings made to the undertenants of the said Robert Bayly;" and he denied notice of the alleged agreement. In a petition which was dismissed for want of prosecution, and in two affidavits filed in this suit, the petitioner had relied on different contracts. The contract relied on in the present suit was a contract for a lease for thirty-one years, at the rent of £100 a-year, and a payment of a fine of £100. In proof of the contract thus stated, the petitioners relied on an entry in the field-book of Howard Holland, which was put in issue by the petition, but turned out not to be signed. The terms of the entry are stated by his Honor (*infra*, p. 513.) Mr. Francis Robert Bayly, the son and agent of Mr. Robert Bayly, was examined before the Court; and an entry in a rent-book, signed "H. H.," which was proved to be in the handwriting of Holland, was relied on. This entry was not put in issue by the petition. The petitioners also relied on part performance of the contract, having been put into possession under it. Mr. Francis Robert Bayly proved that he had no written authority from his father to make leases, but he had his general sanction, and that anything he did his father would have sanctioned; that he gave authority to Holland to let the farm to the petitioners at £100 a-year rent, and £100 fine, for a term of thirty-one years; that Howard told him of the arrange-

ment he had made, and he adopted it; received the rent and the fine, £57 of which was paid by a bill, and the balance, £43 or £44, was allowed to the petitioners for rates due before they went into possession of the farm, and paid by them. That the transaction completely escaped his recollection on the occasion of the sale to the respondent, and that they dealt on the supposition that there was no lease to bind him.

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RICE  
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Statement.

Mr. Serjeant *Sullivan* and Mr. *Nelligan*, for the petitioners, contended that a complete contract by an authorised agent was disclosed by the entries in Holland's field-book and in the rent-book, which contract had been adopted and acquiesced in by Robert Bayly: *Maclean v. Dunn* (a); *Wilson v. Thomond* (b); *Norris v. Cooke* (c); *Bradford v. Roulston* (d); *Blakely v. Smith* (e); *Johnson v. Dodgson* (f); *Soames v. Spencer* (g). The contract was stated in the petition, and the entries which were merely evidence of it need not have been put in issue. The respondent had actual and constructive notice of the contract: *Le Neve v. Le Neve* (h); *Jones v. Smith* (i); *West v. Read* (k); and took by the terms of his conveyance expressly subject to it: *Taylor v. Stibbert* (l); *Barnhart v. Greenshields* (m). The registration of the conveyance gave him no higher right, for the Registry Act applies only where there is a conflict between two deeds; and there can be no conflict where one is stated to be expressly subject to the other: *Gilman v. Crosby* (n).

Argument.

Mr. Serjeant *Lawson*, Mr. *Brewster* and Mr. *Jellett*, for the respondents.

The terms of the contract are not clearly before the Court. In order to induce the Court to enforce a contract on the ground of part performance, the terms of the contract must be clear,

(a) 4 Bing. 722.

(b) 6 Sc., N. R., 894.

(c) 7 Ir. Ch. Rep. 37.

(d) 8 Ir. Ch. Rep. 468.

(e) 11 Sim. 150.

(f) 2 M. & W. 653.

(g) 2 D. & R. 653.

(h) 2 W. & T. 21.

(i) 1 Hare, 60.

(k) 2 Hare, 257.

(l) 2 Ves. jun. 437.

(m) 2 Eng. Eq. Rep. 1217.

(n) 7 Ir. Ch. Rep. 557.



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precise, and definite, so as to leave no doubt whatever on the mind of the Court: *Lord St. Leonards on Ven. & Pur.*, p. 126; *Reynolds v. Waring* (a). There is no notice in this case which would make the alleged contract binding on a purchaser under a registered deed. To have that effect, the notice must be of such a description as to affect the purchaser with fraud: *Hamilton v. Royse* (b); *Smith v. Smith* (c); *Popham v. Baldwin* (d); *Jolland v. Stainbridge* (e); *Hine v. Dodd* (f). *Taylor v. Stibbert* (g), and *Stoughton v. Crosbie* (h), were decided on the principle of avoiding circuitry of action; which principle does not apply to this case; for the respondent's conveyance was subject only to existing leases and lettings. This was not an existing lease or letting: *Townsend v. Mostyn* (i). Going into possession is not a part performance of the contract, unless it be done in pursuance of it: *Brennan v. Bolton* (k); *Parker v. Smith* (l). Here, when possession was given by Holland, the terms of the alleged contract had not been settled.

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Judgment.

#### THE MASTER OF THE ROLLS.

The petition in this case is for the specific performance of a contract for a lease, alleged to have been entered into by Robert Bayly with the petitioners, in the year 1850. It was (as alleged in the petition) thereby agreed that the said Robert Bayly should make a lease to the petitioners, of part of the lands of Ballymacawhim, in the county of Kerry, for a term of thirty-one years from the 25th of March 1850, at a rent of £100 a-year, and on payment of a fine of £100. It is not alleged by the petition that there was any written agreement signed by the said Robert Bayly, or by any person authorised by him. But the petition alleges that one Howard Holland, as agent of the said Robert Bayly, after giving the petitioners the possession of the said lands, made an

(a) *Younge*, 246.

(c) 2 L. R., N. S., 157.

(e) 3 Ves. 478.

(g) *Ubi supra*.

(i) 26 Beav. 72.

(b) 2 Sch. & Lef. 327.

(d) 2 Jones, 328.

(f) 2 Atk. 275.

(h) 5 Ir. Eq. Rep. 451.

(k) 2 Dr. & War. 240.

(l) 1 Coll. 624.

entry or memorandum in writing, in what has been called a field-book, of the terms on which he gave the petitioners possession of the said lands; and which entry is in those words:—"I have this day, on the part of Robert Bayly, Esq., of Cork, let to Mrs. Catherine Rice and Mr. Henry Rice her son, both of O'Dorney, in the county of Kerry, the farm of Ballymacawhim, as late in the possession of Matthew and John Bunyan (except Daniel Glavin's lot, which they are not to have until September next), for £100 fine, and £100 a-year, for thirty-one years from the 25th of March 1850, with turf for said farm on the lands of Aghamore, as soon as Mr. Bayly gets possession of it; and given possession to Mr. Henry Rice of the said lands and houses, except one cabin held by J. Hussey." This entry was not signed or dated; but it appears to have been made on the 25th day of April 1850.

Howard Holland was not the agent of Robert Bayly. The agent of the property was his son, Francis Robert Bayly; and Howard Holland was the bailiff.

Robert Bayly sold the lands of Ballymacawhim, amongst other lands, to the respondent Thomas O'Connor, by deed of conveyance of the 24th of March 1858; and the deed was registered on the 7th of April 1858. The petition puts in issue matters to show that the respondent had express notice of the alleged agreement, before the date of the conveyance of the 24th of March 1858, and before the payment of the purchase-money. I am of opinion, however, that the respondent had no such express notice. On the contrary, the communications made to him by Mr. Francis Robert Bayly were calculated to lead the respondent to believe that there was no contract or agreement with the petitioners. The answer of Mr. F. R. Bayly, on his *viva voce* examination, to the hundredth question, is clear on this point; and his letter to the respondent, of the 24th of October 1857, is a distinct allegation that there were no leases, except to a Mr. Rice (not the agreement in question), and to a Mr. Mason.

The memorandum in Holland's book was made on the 25th of April 1850; and the letter of Mr. Francis Robert Bayly, of the

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*Rolls.*  
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 Judgment.

following day, is relied on by the respondent's Counsel as showing that Holland had no authority on the 25th to enter into any contract with the petitioners. The only witness produced for *visa voce* examination, or examined by the petitioners, was Mr. Francis Robert Bayly, although Mr. Robert Bayly was in Court. Holland was not produced or examined, as he ought to have been. It was supposed, during the examination of Mr. F. R. Bayly, that the entry by Holland in his field-book, which is the document put in issue by the petition, was signed by Holland; and the case was argued on that assumption. It was the duty of the petitioners to have had Holland in attendance, and to have produced the field-book. Some days after the examination had closed, the field-book was produced; and it turned out that the entry was not signed. The petitioners' Counsel then sought to rely on an entry in a book kept in Mr. Bayly's office, stating the letting to the petitioners, and which was initiated by Holland with the letters "H. H.;" and that entry was relied on by the petitioners as evidence of a contract regularly signed, as required by the Statute of Frauds, by an agent of Mr. Robert Bayly. It is important, in considering whether the respondent is bound by the alleged contract, having regard to the terms of the deed of conveyance to him, to which I shall just now advert, to ascertain whether the contract, if any, with the petitioners, was a contract duly executed under the Statute of Frauds, or a contract unsigned, which, with part performance, might have been enforced against Mr. Robert Bayly.

The respondent, by his answering affidavit, denies all notice of the alleged agreement until after the purchase made by him; and he denies the facts relied upon as evidence of notice. The first difficulty under which the petitioners labour is, that the evidence of the contract is very contradictory. In the former petition, filed by the petitioners against the respondent and Robert Bayly, in September 1859, the contract was alleged to be an agreement for a lease for thirty-one years, with *toties quoties* covenant for renewal. The petitioners entered a rule to dismiss that petition, after the answering affidavits were filed. In an affidavit made by the petitioners in this matter, and filed the

13th of August 1860, the contract is stated to have been for a lease for thirty-one years, or the life of the petitioner Henry, with a *toties quoties* covenant for renewal. Another statement of the contract is made in the affidavit of John R. Rice, filed the same day, on the part of the petitioners, he having been present when Howard Holland gave possession to the petitioners; and he states the interest to have been for thirty-one years, or the life of the petitioner Henry, "or the option of taking a lease, with a *toties quoties* clause."

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Rolls.  
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Judgment.

In *Lord St. Leonards'* work on *Ven. & Pur.*, p. 126, it is stated that "A growing reluctance is manifested to carry parol agreements into execution, on the ground of part performance, where the terms do not distinctly appear; and although, according to several authorities, the mere circumstance of the terms not appearing, or being controverted by the parties, will not of itself deter the Court from taking the best manner to ascertain the real terms, yet the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract."

It appears to me that the entry in the office-book, signed by Howard Holland, and which is not put in issue, cannot be relied on by the petitioners in this suit, and that the case must rest on the entry in the field-book of said Howard Holland, which is put in issue, and which was not signed. The respondent is a purchaser for valuable consideration, and (as I consider) without notice of the petitioners' claim; and, I think, his Counsel are entitled to insist that evidence of a written document not in issue should not be received. If the document not put in issue, and to which the initials "H. H." are affixed, had been relied on, some important questions would have arisen upon it, and which would, no doubt, have been raised if the document had been referred to in the petition.

Assuming that the petitioners can be permitted to rely on the contract stated in the petition, having regard to the contradictory statements made by them in the former and in the present suit, as to what the contract was, the question arises, whether the contract, as alleged in the petition, and entered in

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*Rolls.*  
 RICE  
 v.  
 O'CONNOR.  
 Judgment.

the field-book, and which was not signed by Robert Bayly, or by any person on his behalf, is binding on the respondent? Of course it is clear, from the cases of *Popham v. Baldwin* and *Wyatt v. Barwell*, and other cases,\* that if it were not for the provisions contained in the conveyance to the respondent, which was "subject to the existing leases and lettings made to the undertenants of the said Robert Bayly," the petition could not be sustained, supposing I am right that there was not that "clear and undoubted notice" which is necessary to affect a party claiming under a registered deed.† The question, therefore, is whether the contract relied on by the petition, which is an unsigned contract, with part performance, is enforceable against the respondent Thomas O'Connor, by reason of the provision in the conveyance which I have stated? I am of opinion that, if the petitioners had obtained a lease from Robert Bayly, or if they held under a contract from him, duly signed under the Statute of Frauds, by himself, or his agent duly authorised, such lease or contract would have bound the respondent O'Connor, having regard to the provision in the conveyance which I have stated; but I am of opinion that an unsigned or parol contract, with part performance, was not an "existing lease or letting," within the meaning of the deed. There is a very obvious distinction between a letting which is a binding contract under the Statute of Frauds, and one which can only be enforced with part performance; that is to say, between an equitable estate and an equitable right.

The terms of the conveyance, "subject to existing leases or lettings," would, I think, include an equitable estate created by a contract duly signed under the Statute of Frauds; but a parol or unsigned contract, to be enforced only if there has been part performance, is not, in my opinion, "an existing letting," within the meaning of the conveyance to the respondent. This subject was carefully considered by the Court of Exchequer, in *Orpen v. Moore* (a). Chief Baron Joy, in giving judgment, stated that

(a) 2 Jones, 442.

\* See Sugden on Ven. & Pur., 13th ed., p. 600.

† Ibid.

"A title founded on the doctrine of part performance cannot be considered as an equitable estate or interest until it has been established by a decree of a Court of Equity." The judgment of Baron Richards, in that case, puts the matter in a very clear point of view, and was approved of by Baron Pennefather. In *The King v. Toddington (a)*, Judge Holroyd adverted to the same distinction between an equitable estate and an equitable right to have a conveyance of the legal estate, as adverted to by Chief Baron Joy in *Orpen v. Moore*. The case of *The King v. Geddington (b)*, and the case of *The King v. Long Berrington*, therein referred to, are to the same effect. It was decided, under the Civil-bill Act, which authorised an equitable defence to an ejectment, that although an equitable contract, duly signed under the Statute of Frauds, and stating fully the terms of the agreement, afforded a defence to the ejectment, yet a contract which was not signed as required by the statute could not be relied on with part performance. There is a plain distinction between an equitable estate and a mere equitable right to enforce the performance of a contract, with part performance, which, as Chief Baron Joy observes, does not become an equitable estate or interest until it has been established by a decree of a Court of Equity.

It may further be observed, that part performance is allowed to be relied on in Equity, because otherwise the Statute of Frauds would be made an engine of fraud;\* but part performance does not, I apprehend, affect a remainderman under a settlement, against whom the contract of the tenant for life, who has a leasing power, is sought to be enforced: *Shannon v. Bradstreet (c)*; *Morgan v. Milman (d)*; *Sugden on V. and P.*, 13th ed., p. 128.

On that principle, why should part performance be allowed as admissible against a *bona fide* purchaser without notice? The defence of the Statute of Frauds is not an unreasonable defence to

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v.  
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Judgment.

(a) 1 B. & Ald. 565.

(b) 2 B. & C. 135.

(c) 1 Sch. & Lef. 72.

(d) 3 De G., M. & G. 33.

\* Sugden on Vendors and Purchasers, 13th ed., p. 123.

1861.  
*Rolls.*  
RICE  
v.  
O'CONNOR.  
*Judgment.*

be relied on by the respondent, under the circumstances of this case.

I offer no opinion whether, on a petition properly framed, stating the entry in the office-book, with the initials "H. H.," in Howard Holland's handwriting, he being only the bailiff and not the agent of Mr. Robert Bayly, such entry could be relied on as an agreement duly signed by the authorised agent of Robert Bayly.\* Robert Bayly was not examined by the petitioners, although he was in Court. Whether the entry in the office-book could be considered as a contract I am not bound to decide, unless I allow a case to be proved which is not made by the petition.

On the whole, I am of opinion that, on the case made by the petition, the respondent, as a purchaser under a registered deed, without express notice, is entitled to have the petition dismissed, unless the unsigned agreement, with part performance, was an "existing letting," at the date of the conveyance to the respondent, within the meaning of the conveyance. I think it was not "an existing letting," as there was no estate or interest at Law or in Equity created by such unsigned agreement, although accompanied by part performance; and the petition must, therefore, be dismissed with costs.

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\* See *Ridgeway v. Wharton* (6 H. of L. C. 238), as to agent's authority to contract; and *Collen v. Gardiner* (21 Beav. 540).

1861.  
L. E. Court.

Landed Estates Court.

In the Matter of the Estate of  
HARRIETT GARDINER, *Owner* ;  
JOHN GARDINER, *Petitioner*.

June 15.

THIS case (the facts of which appear fully in the judgment) arose on a motion to make absolute the conditional order for sale.

The *Solicitor-General* and Mr. *Alexander Graydon*, for the petitioner.

There is nothing in this case to prevent the order being made absolute. The petitioner's charge of £1000 is not merged by the operation of the deed of the 9th of April 1853, but the conveyance is made expressly subject to this charge; and, therefore, the principle of *Drew v. Lord Norbury* (a), and that class of cases, that where a party executes a deed in one character he executes it in all, does not apply.

Mr. Serjeant *Sullivan* and Mr. *A. Norman*, for the owner.

The owner does not dispute the petitioner's title to this sum of £1000; but maintains that he cannot raise it during his lifetime, since, by special contract between the parties, this sum is pledged to the owner during the petitioner's life. The deed of the 9th of April 1853 conveys all the petitioner's estate and interest in the lands comprised in the petition; and the words "subject to the

A, tenant for life of lands (with power of charging £1000 thereon for his own use), with remainder (in the events which happened) to his daughter B in tail male, by a deed, for value, conveyed the lands, and all his interest therein, to B, subject (amongst other things) to the charge of £1000, and covenanted for good title, quiet enjoyment and further assurance. B subsequently became the purchaser of a judgment for £3000, entered up against A before the date of the conveyance.

ance.—*Held*, that although the effect of the conveyance was not to merge the charge during the lifetime of A, yet that the petition must be dismissed with costs, on the principle of Equity that a tenant for life, having a charge on the inheritance for his own benefit, cannot deal with it so as to prejudice a judgment creditor on his life estate, and also because, under the covenant for quiet enjoyment, A was bound to indemnify B against the judgment, the amount of which he must pay before he could raise his charge of £1000.

(a) 3 Jones & Lat. 267.



1861.  
*L. E. Court.*  
*In re*  
 GARDINER.  
 Argument.

principal sum of £1000" are merely inserted to show that it was not intended to destroy this charge after the death of John Gardiner. The conveyance of the 9th of April 1853 is also made subject to the charge of £4500, which is admittedly not a charge on the life estate, and this shows the object of alluding to the £1000. He referred to *Johnston v. Webster (a)*; *Drew v. Lord Norbury (b)*; *Walpole v. McClintock (c)*.—[LONGFIELD, J. *Johnston v. Webster* does not apply, as in that case there was a clause that the charge should, in the event which happened, sink into the residue.]—In addition to the foregoing reasons, this order cannot be made absolute against the owner, since she is assignee of the judgment for £3000, and, therefore, entitled to be paid the amount of it by the petitioner, before he can proceed to sell the estate.

LONGFIELD, J.

June 19.  
 Judgment.

The petition in this case has been presented by John Gardiner, the father of the owner, for the sale of the estates comprised therein, and for payment, out of the proceeds of the sale, of a sum of £1000, and interest, to which the petitioner alleges he is entitled. On this petition a conditional order has been made, against which the owner Harriett Gardiner has shown cause. The facts of the case are simple. On the marriage of the petitioner with Elizabeth Cuffe, his first wife (since deceased), the lands the subject of the petition were settled by an indenture of the 11th of May 1819, subject to the life estate of the father of the petitioner, to the use of the petitioner for life, with remainder to the sons successively in tail male, with remainder to the daughters of the marriage, as tenants in common, in tail male. And by this indenture power was given to the petitioner to charge, by mortgage or otherwise, the said lands with a sum of £1000, late currency, for such purposes as he might think fit. Elizabeth Cuffe died a few years after, leaving Harriett Gardiner the owner the sole issue of the marriage, who thereupon became entitled to the said lands, as tenant in tail male in

(a) 4 De G., M. & G. 474.

(b) *Ubi supra*.

(c) 7 Ir. Eq. Rep. 353.

remainder expectant on the decease of the said John Gardiner. In the year 1827, Hannah Gardiner, a sister of the petitioner, married, and, by an indenture of the 22nd of October 1827, executed previously to her marriage, the petitioner exercised his power to charge £1000 as a collateral security for his sister's portion of £1000, as doubt was entertained whether her portion was well charged upon the land; but the deed provided that, on the payment of the portion of Hannah Gardiner out of the principal fund, the said sum of £1000 should belong to the petitioner absolutely. It was not, perhaps, very prudent in John Gardiner to execute this deed, as by so doing he spoiled his title to the charge, at least until his sister's portion was satisfied. John Gardiner, the petitioner, married a second time in 1832; an ante-nuptial settlement was then made between the said John Gardiner, of the first part, Eleanor Knox Gore (his present wife), of the second part, and James Knox Gore and Charles Nesbitt Knox, trustees, of the third part, and which was dated the 11th of September 1832. As John Gardiner was but tenant for life, he could only provide for his second wife, and her children, by means of his interest in the charge of £1000, or by insuring his life. Accordingly, by this deed the charge of £1000, and two policies of assurance, one on the life of one Thomas Palmer for £3000, and the other on the life of the petitioner for £1000, were made the subject of settlement. The trusts of the two policies were for the benefit of the issue of the marriage, and an annuity was granted to the trustees out of the said lands, to pay the premiums on the two policies, and also on another policy for securing an annuity of £300 per annum to the petitioner's wife, in case she should survive him. As it was possible that the petitioner might die during the lifetime of Thomas Palmer, it was necessary to provide an additional fund for the payment of the premiums on the policy of £3000; and, therefore, the trusts declared of the charge of £1000 were, out of the income, to pay the premiums on the last mentioned policy; but on payment of the policy of £3000, to pay the principal to the petitioner absolutely. Thus the petitioner was entitled to the charge of

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*L. E. Court.*  
*In re*  
**GARDINER.**  
*Judgment.*

1861.  
*L. E. Court.*  
*In re*  
 GARDINER.  


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*Judgment.*

£1000, subject to the trusts of the deeds of the 22nd of October 1827 and the 11th of September 1832. It appears, from the affidavit of the owner, filed as cause against the order, that in 1847 she was unable to obtain any allowance or means of support from her father, with whom she did not reside; and that, for the purpose of ensuring a maintenance, she agreed with him that, in consideration of his granting to her an annuity of £200 a-year out of the lands, during their joint lives, she would charge her estate in remainder with £4500 for the children of her father's second marriage. A deed was executed to carry out this arrangement, dated the 26th of January 1849, and made between John Gardiner, of the first part, Harriett Gardiner, of the second part, Keith Hallows, of the third part, and James Knox Gore and Ernest Gore (trustees of the settlement of 1832), of the fourth part, by which John Gardiner granted to Harriett Gardiner an annuity of £200 out of the said lands, during their joint lives, and Harriett Gardiner charged her estate in remainder with £4500 for John Gardiner's children. This £4500 was substituted for the two policies of £3000 and £1000, for the trustees released the two policies from the trusts of the settlement of 1832. A question might, perhaps, arise, in case the £4500 was not well charged, how far the release of a mere trustee could operate; but, on this motion, it is immaterial. By this deed the children of the second marriage were gainers by £500, and the life estate was freed from the burden of keeping up the two policies; or, if they were kept up, it was for the benefit of the petitioner; the charge also of £1000 was freed. In this last indenture there is mentioned a judgment obtained against the petitioner by one Alexander Clendinning, in the year 1847, in the penal sum of £3000, and it is expressly excepted from the covenant for good title.

The annuity of £200 fell into arrear, although John Gardiner covenanted to pay it. Miss Gardiner then took steps for the recovery of the arrears, in which I presume she was well advised; she did not resort to the lands, but proceeded against her father personally, and obtained a judgment against him for £325, by

virtue of which she could at any time have arrested his person, or taken in execution his chattels. In this state of things a memorandum of agreement, and an indenture in pursuance thereof, were made, dated respectively the 26th of February 1853, and the 9th of April 1853, by the former of which it was agreed that the petitioner should assign over his life estate to the owner, and that on such assignment Harriett Gardiner should release the person and effects of the petitioner from the judgment for £325, and enter into a covenant to resort solely to the lands for the payment of the annuity of £200. By the formal deed of the 9th of April 1853, John Gardiner granted the said lands, and all his estate, right, title and interest therein, to a trustee in trust for Harriett Gardiner, subject to the principal sum of £1000 of the late currency, the sum of £4500, and as well the arrears, as also the accruing and future payments of the annuity of £200; and also subject to the judgment for £325. This indenture contains covenants by the said John Gardiner for good title, quiet enjoyment, and further assurance. The owner does not question the right of the petitioner to this charge of £1000, but contends that he is precluded from raising it during his own life, as it is merged during that period by the effect of the conveyance of 1853. This deed *prima facie* conveys all the interest of the petitioner, and the charge could not be raised during his life, were it not for the words "subject to the sum of £1000." It is curious that the conveyance is made subject to the £4500, which was not a charge on the life estate, and to the annuity of £200, and judgment for £325; but these two last are probably mentioned in order that the owner might derive under them whatever priority she could to puisne incumbrances. I am of opinion that the effect of this deed was not to merge the charge of £1000 during the life of John Gardiner. It is true that in the memorandum of agreement no allusion is made to the charge; and the formal deed purports to be made in pursuance of the agreement; but the parties were at liberty to add to the deed anything omitted or forgotten in the agreement. This is not the case of a settlement after marriage,

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*L. E. Court.*  
*In re*  
 GARDINER.  


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*Judgment.*

1861.  
*L. E. Court.*  
*In re*  
 GARDINER.  


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*Judgment.*

made in pursuance of marriage articles; there the articles control the settlement, and nothing can be inserted in the latter which will be less favourable than the articles to the issue. It appears, however, that Alexander Clendinning, the conusee of the judgment for £3000 (or rather his assignees, for he became a bankrupt), obtained a receiver over the lands, and the receiver was in 1851 extended, on the petition of Harriett Gardiner for the payment of the arrears of her annuity. This shows that she had full notice of Clendinning's judgment; and the question arises whether she, as assignee of this judgment, can set it up against the charge of £1000, or whether any peculiar equity arises from notice, which would prevent her from doing so?

Miss Gardiner found it expedient to purchase for £600 Clendinning's judgment, on which about £2000 was due—the assignees, no doubt, thinking it was the full value, as the probability of payment in full was doubtful. This judgment was accordingly assigned to the owner, by an indenture of the 9th of August 1854. There is nothing peculiar in this assignment, except that John Gardiner is a party to it, and that Harriett Gardiner covenants not to issue any writ of *capias* or *fieri facias*, or seize under execution the personal property of the said John Gardiner, but that she would resort to his real estate alone for the payment of this judgment. I am of opinion, on all the facts, that the cause shown must be allowed with costs. John Gardiner is prevented from raising the £1000 during his life, by reason of the owner being assignee of Clendinning's judgment. There is nothing contained in any of the documents before me which would have enabled John Gardiner to raise the interest on the charge of £1000 during his life. He could not have assigned the charge so that his assignee could have recovered interest, for Clendinning's judgment is prior to it in equity; for it is settled law, and the principle has been frequently followed here, that a tenant for life, having a charge on the inheritance for his own benefit, cannot deal with it in prejudice to a judgment creditor on his life estate; the only exception to this rule being in the case of a purchaser for value without notice:

*In re Philips (a).* It is contended by the petitioner that the owner purchased the judgment with full notice, and that, therefore, she is prevented from availing herself of any advantage the judgment might otherwise give her. No doubt she had notice, but I do not think that affects the case. Notice has only two effects. Firstly, it prevents objections to carrying out a contract on the ground that the thing contracted for is not in the condition in which it is described in the contract; as, for instance, if I contract to buy a house the roof of which is out of repair, notice, at the time of the contract, of this defect, will prevent me from objecting to the contract. Secondly, notice of a prior valid equitable incumbrance prevents a subsequent incumbrancer from getting in the legal estate, and setting it up against such prior equitable interest. Notice does not operate in either of those ways in the present case. By the express terms of the deed of 1853, John Gardiner, having covenanted for quiet enjoyment, was bound to indemnify the owner against this judgment; and although his person could not have been arrested, or his goods and chattels seized on account of the covenant in the assignment of the judgment of 1854, the action on the covenants in the deed of 1853 was not gone, and she might still resort to his assets or to his other estates, if he had any, to indemnify her against this judgment. The covenant for quiet enjoyment in the deed of 1853 was broken by the receiver being in possession, or any other person coming in under John Gardiner. Let me suppose that the order is made absolute, and the estate sold, how should I distribute the purchase-money? The judgment of Clendinning is a charge, and the first charge, on the life estate of John Gardiner. The value of the life estate should be calculated, and out of it Clendinning's judgment should be paid, since it has priority over the charge of £1000, except in favour of any of the parties claiming under either of the deeds of 1827 or 1832, but in favour of no one else; the surplus of the money representing the life estate (if any) would be paid to Harriett Gardiner. The charge of £1000 could not be paid during the lifetime of the petitioner; no

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*L. E. Court.*  
*In re*  
GARDINER.  
Judgment.

1861.  
*L. E. Court.*  
*In re*  
GARDINER.  

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*Judgment.*

doubt it is in existence, but it was vested in him for his own benefit at the time Clendinning's judgment was entered up, and, therefore, the latter obtains priority as respects the life estate. Then out of the value of the inheritance the charge of £1000 would be paid; but thereupon Harriett Gardiner would come in and say, I must be recouped out of the life interest in the £1000 for the £3000 judgment being raised out of the life estate. It is therefore impossible that John Gardiner could raise the £1000 unless he first paid off Clendinning's judgment, which he is not ready to do. The petition, therefore, is a most inequitable one, and the cause shown must be allowed with costs.

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# APPENDIX.

## Metropolitan Consistorial Court of Armagh.

Office promoted by the  
LORD BISHOP OF DOWN AND CONNOR

v.

Rev. T. F. MILLER and Rev. S. G. POTTER.

*G. J. Ball, Q. C., LL.D., W. F. Darley, Q. C., LL.D., and C. J. Knox, LL.D.,* Counsel for promovent.—*Joseph Stock.* Proctor.

*G. Battersby, Q. C., LL.D., J. E. Walsh, Q. C., LL.D., and E. Lindsay, LL.D.,* Counsel for impugnants.—*A. Ormsby,* Proctor.

DR. RADCLIFF, V. G.

1861.  
March 21.

These are causes of office promoted by the Bishop of Down and Connor, against the Rev. Samuel George Potter and the Rev. Thomas Fitzwilliam Miller, the Vicar of Shankhill, otherwise Belfast, respectively. That against Mr. Potter is for publicly preaching and assisting in the performance of Divine Service, in the parish church of Belfast, called St. Anne's Church, without any license or authority of the Bishop for so doing, and also for setting at defiance the lawful command and prohibition of the said Bishop. And the cause against Mr. Miller is, for permitting Mr. Potter so to preach, and assist in performing Divine Service in said church, on Sunday 12th of August 1860, without any such license or authority, and for setting at defiance the lawful command and prohibition of the said Bishop, in violation of his oath of canonical obedience, and of his ordination vow.

The causes come by letters of request from the Vicar-General of Down and Connor (in which latter diocese Belfast is), in the province of Armagh; both citations were returned on the 11th of September 1860, and both impugnants having duly appeared on the same day, articles were exhibited in each suit.

The facts and documents alleged thereby having been admitted by consent, impugnants, on the 13th of November 1860, exhibited defensive pleas, on the admissibility whereof a long discussion took

An inhibition, signed at the Bishop's desire, by the Vicar-General of a diocese, and under the seal of the Consistorial Court, forbidding a strange clergyman preaching in the diocese, is, in fact, the inhibition of the Bishop, and is not a judicial act requiring a previous citation. A Bishop of one diocese has the power to inhibit, at his pleasure, and without cause assigned, a benefited and licensed clergyman of another diocese from officiating or preaching in his diocese with-

out his license, though the clergyman has the leave of the Incumbent to preach in his church. A license to serve a cure in one diocese determines by the Curate giving up the cure, and leaving the diocese wherein he was residing. A usage of clergymen of different dioceses to occasionally assist one another, and preach without the Bishop's license, is of no avail against his inhibition.

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Consist. Court.  
 BP. OF DOWN  
 v.  
 MILLER.  
 —  
 Judgment.

place; but, by reason of the peculiar frame of the defensive pleas, no satisfactory decision could be made on the main question in dispute between the parties. An order, therefore, was made, by which the defensive pleas were admitted; but all questions of law, as well as the costs of the exception and argument, were reserved to the hearing.

Additional articles were afterwards exhibited on the part of the Bishop, which do not materially affect the case; and consents were entered into for the admission of all material facts, and to have the causes heard in Dublin, before me, without prejudice to the right of appeal by either party.

The articles against Mr. Miller, who was instituted in 1848, 3rd of January, charge that, at an interview at the office of the Vicar-General, on Tuesday the 7th of August 1860, the Bishop informed Mr. Miller that he could not consent to Mr. Potter preaching or officiating in his diocese; and, as admitted by consent, during the conversation, told Mr. Miller to write to Mr. Potter, stating that he the Bishop did not wish him to preach in Mr. Miller's church; and that thereupon Mr. Miller suggested that the Bishop should write to him, Mr. Miller, stating what he wished, and which the Bishop stated he would do. That, in pursuance of Mr. Miller's request, the Bishop addressed the following letter to Mr. Miller:—

“The Palace, Holywood, Aug. 8, 1860.

“MY DEAR SIR—As I understand that you have invited the Rev. Samuel G. Potter to preach in your church next Sunday, I regret to say that I feel it my duty to inhibit him from so doing, upon account of the sermon preached by him, in Down Cathedral, on the 12th of July; as I consider its tone and language, as reported in the *Downpatrick Recorder*, calculated to stir up, rather than allay, religious animosities between us and our Roman Catholic brethren.

“It has been my heartfelt desire and constant object to promote brotherly love among all sects of Christians throughout my diocese, in which object I rejoice to say I have had the co-operation of my clergy; and it would be a source of deep regret to me, and equally so, I am sure, to all right-minded people, were those kindly feelings which are springing up amongst us to be checked or imperilled by a repetition, from a pulpit in Belfast, of the language and sentiments reported to be used by Mr. Potter in Downpatrick, or those which he subsequently embodied in a letter recently published by him.

“Under these circumstances, my duty, though painful, is clear; and I must, in consequence, inform you that I cannot consent to Mr. Potter officiating in Belfast. I feel assured that you will respect, even should you not concur in, my views, and that this ex-

pression of my opinion will obviate the necessity of any more formal intimation.—I am yours truly,

“ROBT. DOWN AND CONNOR.”

“To the Rev. T. E. MILLER, D.D.”

In reply whereto Mr. Miller sent the following reply to the Bishop:—

“Belfast, 10th August.

“MY LORD—I am in receipt of your Lordship’s letter of the 8th instant, in which you intimate your intention to inhibit Mr. Potter from preaching in the parish church, owing to the tone and language of his sermon in Down Cathedral, on the 12th July. I beg to state that I was present, with the Dean and Chapter of Down, on the occasion, heard the sermon, and feel bound to testify to your Lordship that no sentiment was uttered not perfectly in keeping with our ordination vows.

“I have invited Mr. Potter to preach not a political but a charity sermon. And of this I am persuaded, that peace and charity should form the golden woof binding the whole discourse; and, I think, my Lord, with all respect, that there were no grounds for pre-supposing that there would be a repetition of the principles set forth in the sermon at Downpatrick, the time and occasion now not suggesting or requiring such.

“I am, as your Lordship is aware, responsible for the balance of a debt on one of the newly erected churches in Belfast; and, but for the kind indulgence of the Directors of the Belfast Bank, legal proceedings ere this would have been instituted against me. I showed you on Tuesday the last notice which I had received from the Bank; mine then is a difficult case.

“But there is one of much greater difficulty still, and one which to my mind brings regret, and that is, that I must differ from my Diocesan on the subject of pulpit jurisdiction. I am under the impression that the Incumbent has the sole control of his pulpit, and that the Bishop would exercise authority not sanctioned by law, did he try to limit the freedom of the Incumbent in that respect. In the maintenance, therefore, of what I believe to be my right, I feel constrained, however reluctant I may be to differ from your Lordship, to uphold the liberty of the pulpit, and allow Mr. Potter to preach on next Sunday, as publicly advertised for the last week.—I have the honor to remain, my Lord, your Lordship’s faithful servant,

“T. F. MILLER.”

That, on the 11th of August, an inhibition under the consistorial seal was duly served on Mr. Miller, peremptorily ordering him not to permit Mr. Potter to preach or officiate in his parish church, or

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parish, without the Bishop's license first had and obtained; but asserting no reason for so doing, save that he was not licensed by the Bishop; and that, notwithstanding such inhibition, Mr. Miller permitted Mr. Potter to preach and officiate on Sunday the 12th of August, contrary to his oath of obedience.

The articles against Mr. Potter charge that Mr. Potter, not having any license or authority from the Bishop to preach or officiate in the Diocese of Down and Connor, was, on the 11th of August, served with an inhibition under the consistorial seal, peremptorily ordering him not to preach or officiate in said church or parish, or diocese, without the license or authority of the Bishop. That, notwithstanding such inhibition, he preached and officiated in said church.

The defensive pleas allege that the authority given to clergymen at ordination is, according to the usages of the Church, a sufficient authority to preach; and that no other license to preach, except in giving charge of a parish to an Incumbent or Curate, has for a long time been granted; and if the practice ever existed, it has ceased, and any canon requiring such has become obsolete. That Mr. Potter was, in 1845 and 1846, ordained a Deacon and Priest by the then Bishop of Down and Connor, and in 1845 was appointed to the curacy of Cushendun, in such diocese, and in 1849 was appointed to the curacy of Stratford-on-Slaney, in the diocese of Leighlin, and was licensed by the Bishop thereof to preach the Word of God in that church, and was so qualified and authorised to preach; and that he did often afterwards preach and officiate in Down and Connor, without any objection being made by the Bishop of such dioceses. That Mr. Miller heard the sermon on the 12th of July, and believed there was nothing unorthodox or improper in it. That there has long been an usage in the Church for such clergy, being duly ordained as aforesaid, to occasionally assist in performing Divine Service, and to preach in churches to which they have no special appointment, when permitted or requested by the Minister thereof, or churchwardens, so to do. That the Bishop had no lawful authority to prohibit Mr. Potter from so preaching, except for just and lawful causes, which neither existed nor were alleged; and that the inhibition was, therefore, void; as also on the ground of its having been issued under the consistorial seal, and purporting to be in the nature of a judicial act, and penal, and that it was illegal to issue such without a citation, so that he might be heard to show cause against the issuing thereof. The defensive pleas further state the peculiar circumstances under which Mr. Miller was placed, as admitted by the consent (Nos. 9 and 6 in the consent), and to be

noticed hereafter. The fifth article of Mr. Potter's plea states that Mr. Potter held no benefice or cure in Down and Connor since 1849, and that the Bishop, therefore, *was not his Ordinary*.

The preliminary objection to the validity of the inhibition, on the ground of its having been issued under the consistorial seal, without a previous citation, and of its purporting to be a judicial act, and penal, is answered by reading the inhibition itself, which could not be done on the argument of the exception. It does not purport to be issued under a decree, nor to be more than the Bishop's prohibition against Mr. Potter preaching in his diocese until licensed by him. It could not bind impugnants as a judgment not appealed from, so as to prevent their questioning the Bishop's right to inhibit, as would have been the case had it been a judicial act. Nor could process have issued thereon to enforce its execution, or punish its violation, as if it were a judgment of the Consistorial Court. The seal of the Court rendered it more formal, but did not convert it into a judicial act. It in reality has little, if any, more effect than the inhibition contained in the Bishop's letter of the 8th of August; and though signed by the Vicar-General, it was plainly, if not admittedly, the Bishop's own act.

The Bishop claims the right to have inhibited Mr. Potter from preaching in his diocese, without assigning any reason for his so doing, save that he had no permission from the Bishop so to preach, and was forbidden by him to do so. The Bishop, in his conversation with Mr. Miller, and by his letter of the 8th of August, assigned reasons for inhibiting Mr. Potter, based on a sermon preached by him in Down Cathedral, on the 12th of July, and on a letter afterwards published. Mr. Miller heard the sermon, and considered that there was nothing in it contrary to his ordination vows, which comprised that of "banishing and driving away all erroneous and strange doctrines contrary to God's word," relied on in argument, and also that of "maintaining and setting forward," as much as lieth in him, "quietness, peace, and love among all Christian people, and especially among those committed" to his charge. Whereas the Bishop, who took similar vows, seemed to intimate that Mr. Potter's preaching was calculated to stir up, rather than allay, religious animosities between Protestants and Roman Catholics. But the Bishop has not inserted his reasons in his formal inhibition, nor has he submitted same to this Court for its opinion or judgment. Neither party hath produced or further referred to the sermon or letter; nor does it appear that Mr. Miller ever read the letter relied on by the Bishop, for he does not mention having done so. Mr. Potter alleges, by his fifth article,

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that of late his sermons had been noticed in the public newspapers, yet the Bishop did not object to any of them; but he does not assert that the report referred to by the Bishop's letter was incorrect. On the contrary, the attempt to bind the Bishop by such reports or notices would seem to support their accuracy; neither does Mr. Potter advert to the letter. Mr. Miller, who heard the sermon, states, in his reply to the Bishop's letter of the 10th of August, "that there were no grounds for pre-supposing that there would be a repetition of the principles set forth in the sermon at Downpatrick, —the time and occasion not suggesting or requiring such." Thus it appears that there was a discussion and a difference of opinion between the Bishop and Mr. Miller respecting the sermon in question, which had been followed by Mr. Potter's letter. But the only question submitted to this Court is, whether the Bishop or the Incumbent, or both, have the control over the pulpit, in the sense assigned by Mr. Miller's letter, and not whether or not the Bishop was right or wrong in the conclusion he arrived at; on which question no sound opinion can be formed, in the absence of proof of the contents of that sermon and letter. There is no doubt but that a preacher may do more harm than good by injudicious violence of language, though his views be orthodox.—[The Judge here referred to the 3rd of the directions of King *William* 3, in 1695, to the Archbishops and Bishops of England, and to No. 3 of *George* 1, directions, 1714.]—But I disclaim any idea of imputing anything bordering on violent or unbecoming language to Mr. Potter, never having read his sermon, or the newspaper in which it was reported, or observed upon.

The question thus raised involves considerations of much importance to the Church. It is, whether or not an Incumbent of a parish, with cure of souls, either with or without the churchwardens, may lawfully permit another clergyman, not beneficed or licensed in the same diocese, to preach or officiate in his church or parish, after that clergyman, though in Priest's orders, and beneficed or licensed in another diocese, shall have been inhibited by the Bishop of the diocese wherein such church or parish is; and though no cause should have been assigned for such inhibition summarily issued.

On the part of the impugnants, it is insisted that every Incumbent has a well-established right to avail himself of the occasional services of any other clergyman in Priest's orders, particularly when beneficed or licensed in another diocese, and that the Bishop of that diocese into which the strange clergyman is to be so introduced has no authority to prevent his so doing, or to

interfere in the matter, unless the strange clergyman should preach unsound doctrine, or misconduct himself; in which case the Bishop might proceed against him in his Consistorial Court (as any other person might). But that his summary inhibition issued without some charge being made and substantiated, after an opportunity being given for defence, would be a nullity. Whilst on the part of the Bishop it is contended that no clergyman has a right to preach or officiate in his diocese when not beneficed or licensed therein, without his license or authority, express or implied; and that the issuing of an inhibition against his so acting, with or without cause assigned, concludes all question of implied authority, and renders the clergyman preaching or officiating, after service thereof, punishable for his contempt, and the Incumbent permitting him to do so guilty of an offence against the Ecclesiastical Law. There being no reported case in which the precise question appears to have been decided, the arguments in support of and against these positions were in a great measure rested on what Counsel on each side contended were, by force of the Ecclesiastical Law—canons and usages of the Church—the relative positions of Bishops and Incumbents, and the rights flowing therefrom, respectively.

In order to arrive at a satisfactory conclusion on the subjects in controversy, it will be necessary to consider the diocesan and parochial system of Church government and discipline, which has been adopted within the United Kingdom, so far as bears on the questions in controversy. Originally there was but one diocese (which was called *parochia*), and no other parson but the Bishop himself, who had the sole cure of souls of the entire diocese. In the course of time that diocese was divided into several other dioceses, and Ministers were ordained by the Bishops to assist them, and sent out to serve the cure, and preach in the several districts assigned to them by the Bishop for the purpose; and the Bishop and clergy resided together in the place where the church or cathedral was. When churches were from time to time founded and endowed in these and other countries, the Bishop sent out his clergy to reside and officiate in these churches and districts annexed, which constituted parishes, reserving, nevertheless, to himself a certain number in his cathedral to counsel and assist him, who are now called Deans, Prebendaries and Canons. But the cathedral continued as it had theretofore been, the parish church of the whole diocese. The Bishop was the chief pastor of the diocese, or (as termed by some), the Universal Incumbent, having the cure of souls therein, and in every parish throughout same, and there-

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fore the right of institution and collation of Clerks to such parishes belonged of common right to him. The Clerks so instituted or collated received the cure of souls therein, from and as assistant to the Bishop, whose Curates they were deemed to be, and they were for a great length of time designated by the name of Curates. They exercised under the Bishop all their rights of preaching—administering of Sacraments, and officiating in the parishes, the cure of souls wherein was committed to them to be served in person. The cure of souls was committed by the Bishop to the Incumbent, and not merely (as Bishop Stillfleet observes, at p. 154, *Eccles. Cases*) the care that Divine offices be performed in his parish, and no other person could have been deputed to serve this cure without the Bishop's license. The Bishop was the Ordinary also and visitor of, and the chief superintendant over, the whole Church within his diocese, all the inferior clergy being bound to obey him as their superior; and at a very early period were obliged to take oaths of canonical obedience on being admitted to their cures or offices. Preaching was deemed to be of great importance, and to be peculiarly the duty of the Bishop himself, and he was enjoined by the earlier constitutions and canons to be active in the discharge of that duty. Formerly the inferior prelates and clergy could not lawfully have preached without special authority from the Bishop, and which authority or license was revocable at his will and pleasure.

In process of time, however, when the parochial clergy were better established, the right of preaching in their churches to their congregation passed, as belonging to the cure of souls, by institution or collation to the benefices and cures, after which the Bishop could not, at his will and pleasure, deprive such Incumbents of their right to preach, though no special license or authority had been granted for the purpose; but, in other respects, his jurisdiction and right of control over all other clergy within his diocese remained as before. The Bishop had, moreover, the right, and used to license and send preachers, though not beneficed, through his diocese, as assistants to himself; and, by a canon of the Council of Lateran (under Innocent III), c. 15, Bishops, particularly those having dioceses of great extent, were directed to take to their assistance able preachers, so that the people might be properly instructed. There were, however, certain friars preachers—Dominicans and Franciscans—who, by Canon Law, were entitled to preach everywhere they should be sent by their superiors; and the Augustinian and Carmelite friars were specially privileged to do so; but all under certain restrictions—such privileges having been conceded by the Pope as supreme head and chief Ordinary. The Bishop had the power,

of his mere will and pleasure, to revoke the authority and license granted to preachers sent by himself through his diocese, and generally, in like manner, to revoke, limit or modify any license or authority to preach, granted to any secular or regular not having *beneficium curatum*, as contradistinguished from those who had cure of souls granted by their institution; it being considered that when cure of souls was conferred on them, the right to do everything necessary for service of such cure was conferred thereby; and, therefore, that as preaching was an essential ingredient in the cure of souls, the right to preach was also conferred by the grant thereof. The Bishop was also authorised to send preachers to the church of those having cure of souls, in certain cases of inability or unsfitness to discharge their own duty; and he might also have sent preachers to the churches of persons having cure of souls in Lent and Advent. A new church or chapel could not have been erected in any parish without the consent of the Bishop; nor could the Incumbent have officiated in any unconsecrated building in his parish without the license of the Bishop, though he had a right to do so in every consecrated building within his parish, by virtue of his institution. Each Bishop had the exclusive right of ordaining the clergy for his own diocese; and orders conferred by strange Bishops, without letters dimissory from the Bishop of the diocese to which the person so ordained belonged, were deemed so irregular that the Clerks so ordained were not permitted to exercise their functions in such diocese without a special dispensation from the Bishop thereof. It was also established that the Bishop of one diocese should not exercise his jurisdiction or episcopal office in the diocese of another Bishop, without his license or authority expressly given. But, having a general authority to preach everywhere, he might do so in any other diocese, if permitted by the Incumbent, unless expressly prohibited by the Bishop of that diocese from doing so; and no Priest or secular clergyman could have exercised his functions in any diocese without the authority of the Bishop of that diocese; and the clergy of other dioceses were particularly enjoined not to do so; and the parish clergy were directed not to permit anyone to preach in their churches without being satisfied of their having the license of the Ordinary.

Whilst the constitutions of the Church protected the rights and privileges of the Bishop of the diocese, they also placed him under restrictions, checks and control. It was at an early period decreed that no Bishop should ordain any Priest or Deacon, without a title, viz., a benefice, cure or office, nor unless he should be of an

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approved life, and sufficient for the full discharge of his office; and the violation of these rules subjected the offending Bishop to severe censures. The negligence of Bishops, in the discharge of this important branch of their duty, caused the enacting of a canon of the Council of Lateran, A.D. 1172, viz.:—"That if any Bishop ordains a Priest or Deacon, without a title, let him maintain him until he can make a clerical provision for him in some church, except he be able to live of his own, or have a patrimony." [Which is embodied in the 33rd canon of 1603, and 30th of 1634]. These canons, on the subject of ordination, were not merely *in terrorem*, as appears from the forms in the Appendix to vol. 2 of *Gibson*, Nos. 8, 9 and 10. The beneficed clergy were also well protected in their rights; for, generally speaking, no other clergyman could preach or officiate in their churches without their permission. There would appear, however, to have been some exception to the general rule, founded on the right claimed by the Pope, as supreme head and Ordinary, of conferring the privilege of preaching and officiating wherever he thought fit to appoint. The Bishop might also have preached and officiated, whensoever he pleased, in any church in his diocese; but he could not have displaced the Incumbent, in favour of any third person, unless, perhaps, in the special cases already adverted to, of his inability or unfitness, and in order to exercise his episcopal privilege of sending Lent and Advent preachers. The language of *Van Espen*, an able collector of, and writer on, Canon Law, where he details the results of the laws of the Church on this subject of episcopal control, is deserving of special notice.

Thus, by canons from time to time made, and usage, as well from the nature of the episcopal office, was generally established in and throughout Christendom a well defined system of diocesan and parochial order and discipline. By it the Bishop had the care and superintendence of his entire diocese, in which no Priest or Deacon was admissible to preach or officiate without his authority—this authority being conferred by institution, collation or license, to benefices and cures, on the clergy to whom cure of souls was by him committed; or specially by license or permission, as deemed fit by the Bishop. Strangers to the diocese (except those who had certain privileges) were not entitled to discharge their functions therein, without permission of the Bishop. But, for the convenience of the beneficed clergy, as well as for the advancement of religion, and by reason of the impossibility of communicating with the Bishop, so as to obtain his special permission in each particular case, as also, as it would seem, from

motives of Christian courtesy, the beneficed clergy were permitted by him to receive the occasional assistance of such strangers as might be in their parish, both in respect of preaching and officiating. Special injunctions were, however, given, to ensure that no stranger should be so admitted to preach or officiate, unless they had evidence of their ordination, and letters from their own Bishop, certifying to their faith and good life. Doctors in Theology were among the privileged class, the University of Oxford having had privileges to license such as preachers, conferred on them at an early period by the Pope, similar to those conferred on Cambridge, or enlarged at a later period.

[In support of the preceding positions, the Judge, among other authorities, referred to the following, viz.: *Gastrel v. Jones*, Dodderidge, J. (2 Roll. Rep., p. 449); *Vaughan v. Ascue*, Lee, C. J. (2 Roll. Rep., p. 454); *Eccl. cases* (Stillington), pp. 12, 13, 88, 143, 144, and preface thereto; 1 *Burn*, pp. 196, 283; 3 *Burn*, p. 73; *Godol. Rep. Can.*, p. 23; *Hooker, Eccl. Pol.*, lib. 7, c. 3, 8; *Plowd.*, p. 457; *Ayliffe*, pp. 125, 167, 401, 4, 6, 7; *Moisy v. Hillcoat* (2 Hag., p. 46); *Bliss v. Woods* (3 Hag., p. 510); 2 *Bulling.*, p. 1055; *Johnson* (ed. 1850), part 1, pp. 195, 269; X, 1, 22, 3; X, 3, 5, 4; 16, Q. 1, c. 41; 16 Q. 7, 11, 19; *Lyndwood*, lib. 1, tit. 10; *Nullus Capellanus, f. verb. ignoti*: lib. 3, tit. 4, *de cler. non resi.*; *f. verb. Præd., verb. Dei*, lib. 5, tit. 5; *De Hereticis in verb. Diocesan*; *g. verb. Auctorizatus est*; *R. verb., Limitata in eo*. 1 *Van. Espen* (ed. 1753), *pars* 1, tit. 16, c. 5 (ss. 6, 10); c. 7 (ss. 3, 5, 7, 8); c. 10 (ss. 1, 2, 5, 6); c. 11 (ss. 1, 2, 6 to 14, 21, 22, 23).]

From time to time these general rules and constitutions of the Church, having been adopted by Councils and Synods, and otherwise, and become part of the Common Law of England and Ireland, were specially enforced in these countries whenever their neglect or violation called for such a course; and there were several canons made by National and Provincial Councils, in both countries, for such purposes, before the Reformation; the earliest of the English canons appearing to be those of the National Council, presided over by Archbishop Theodore, which adopted a large portion of the Canon Law of the Church. Some of these canons do not purport to do more than provide for the enforcement of existing rules, and provide some special or additional censure or punishment for their non-observance, so as to introduce greater uniformity of discipline in the Church of these realms. Some of them use expressions respecting hospitality, referring to the custom of the Bishops and clergy, when living in common together, to receive

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and entertain all strange Bishops and clergy who should pass through the diocese, and also of the parochial clergy, when they had more extensive districts under their charge.

The Council (National) under Theodore, Archbishop of Canterbury, assembled A.D. 673 (of which the whole proceeding is stated in 1st *Johns.*, p. 88), adopts several of the canons of the Church; No. 2 being that no Bishop invade the parish of another, but be content with the government of the people committed to him.

No. 5—That no Clerk, leaving his own Bishop, go up and down at his own pleasure, nor be received whenever he comes without the commendatory letter of his Bishop.

No. 6—That strange Bishops and Clerks be content with the hospitality that is freely offered to them; and let not any of them exercise any priestly functions without the permission of the Bishop in whose parish he is known to be.

These canons, Nos. 2 and 6, follow and explain Nos. 26 and 28 of what are called the Apostolical Canons, some of the earliest known. They are collected, as translated by *Johnston*, in his *Vade Mecum*, p. 19. At the Synod of Cealchythe, presided over by Wulfred, Archbishop of Canterbury, A.D. 816 (1 *Johns.*, p. 300), canons were made relative to the admission of strangers, in enforcement of the existing law; No. 11, p. 307, being—"That (as it is found in old times by tradition from ancient fathers) it would be unlawful for any Bishop to invade the parish of another, or draw any ministration to himself which belongs to another, excepting only the *Archbishop*, because he is the head of his own Bishops. But let others be content with their own, or act with the license and consent of the *Bishop* in whose diocese they minister. If anyone transgress in this respect; let him make satisfaction according to the judgment of the Archbishop, unless he be willing, first, to be reconciled to the proper Bishop of the diocese; and we give the same in charge to Priests, that no one covet more business than is allowed to him by his *proper Bishop*, excepting only in relation to baptism and the sick," &c., &c. Though other canons were made at subsequent Provincial Synods of Canterbury, to prevent the admission of unqualified strange preachers, which, so far, recognise the practice of Incumbents permitting strangers to preach and officiate in their churches without any special license or authority from the Bishop of the diocese, there is nothing to show that the right of the Diocesan to prohibit any clergyman from so preaching or officiating was ever interfered with or denied during such period. In 1400-1, the *first Act of Parliament*, 2 Hen. 4, c. 15, requiring preachers to be licensed (of which more hereafter) was passed; and

in 1408 it was followed by the Constitutions of Arundel: *De Hereticis*, 2 *Johns.*, p. 459, which, though merely provincial, contain enough to show that they only purported to enforce the ancient laws of the Church. It was thereby provided that no clergyman, unless authorised by the *Canon Law* or *special privilege*, should preach within or without a church to the people or clergy, "unless he present himself to the Diocesan of the place in which he attempts to preach, and be examined, and then, being found qualified, &c., let him be sent by the Diocesan to preach to some certain parish or parishes, as to the same Ordinary shall seem expedient." It then vindicates the constitution from the imputation of having been made for the sake of fees, and adds:—"If any do knowingly violate this our statute (which is only a *putting the ancient law* in execution), after its publication, by preaching, of his own temerity, contrary to the form herein mentioned, let him incur the sentence of greater excommunication *de facto*." As this constitution or canon most clearly applied to occasional preachers (Lollards and others), though they preached in churches with consent of the Incumbents, the declaration of the law is important.

The injunction as to the necessity of strangers bringing commendatory letters was repeated by No. 3 of *Langfranc's Canons*, at Winchester, A.D. 1071; and again, under the same Archbishop, in 1076, and also by Archbishop Reynolds' Constitution, 2 *Johns.*, p. 333, A.D. 1322, and *Lyndwood*, p. 33; and was again enjoined by Archbishop Arundel's Constitution at Oxford, A.D. 1408; 2 *Johns.*, p. 469; *Lyndwood*, p. 48.

At a Convocation held in the province of York, in 1462, it was decreed—"That the Provincial Constitutions of Canterbury be received and observed for law in York;" so that the argument as to the Constitution of Arundel, and others, having been in force in one province only in England, is answered by the above decree of 1462. Throughout them all, the authority of the Diocesan, in respect of preachers, is recognised as supreme, unless superseded by his superior Ordinary, whether Archbishop or Pope. The Incumbents of parishes in England and Ireland, having the freehold in their churches, had also a remedy, by action of trespass, against anyone, in the Temporal Courts, save their superior Ordinary, who should attempt to preach or officiate in their churches; which made their power of exclusion stronger than if it only rested on Ecclesiastical Law: *Turton v. Reignolds* (a); and this peculiar and exclusive right in the freehold of his parish church is referred to by Sir W. Scott, in *Duke of Portland v. Bingham* (b).

(a) 12 Mod. 420, 433.

(b) 1 Hag., C. R., 161.

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The Churches of England and Ireland seem, from the earliest period, to have been governed by the same rules and principles; and, so far was their identity carried out in other respects, that one of the resolutions adopted by the National Synod of Cashel, held after the arrival of Henry the Second in Ireland, A.D. 1172, was, "That all Divine Service in the Church of Ireland should be kept, used and observed in like order and manner as it was in the Church of England." All the English statutes made against Provisors were adopted here, first, in 1454, by the Irish Act of 32 *Hen.* 6, c. 1; and again, in 1495, by 10 *Hen.* 7, c. 5. There appear to have been canons made from time to time at Councils and Synods held in Ireland, similar to those made in England, some whereof are still forthcoming, and are to be found in 1 *Wilk. Concilia*, pp. 2, 548, 551, and in 1 *Ware*, pp. 315, 317. It appears that Fitz Ralph, Archbishop of Armagh (according to *Ware*, p. 82), was, between 1347 and 1360, engaged in an attempt to deprive the friars of their privilege of preaching without the license of the Bishop of the diocese; and he also joined and co-operated with the English Bishops for the like purpose, though they were all defeated by the friars. The two Churches seem to have been dealt with by the Pope, before the Reformation, as identical in discipline on the subject under consideration; for, in 1503, Julian, Bishop of Ostia, by authority of Pope Alexander VI, issued a Bull, granting to the Chancellor of the University of Cambridge either new or increased power to choose, in each year, twelve doctors, masters or graduates, in Priest's orders, who, being deputed under the University seal, might preach everywhere, "*per totum Regnum Angliæ, Scotiæ et Hiberniæ*;" save that they should not preach in the places where the Ordinaries of the place preach, without their consent, and that the license of the Ordinary of the place should not be required by them—" *Consensu tamen Rectorum Ecclesiarum interveniente.*" This Bull is recited *verbatim* in licenses to preach granted thereunder in 1522, set forth in Appendix to *Strype's Life of Parker*, No. 35, book 3. From this Bull it is plain that the three Churches were considered to have the same laws respecting the power of Bishops over preachers in their diocese, and that none could preach without the authority of the Bishop, or some superior Ordinary.

Queen Elizabeth, by Letters Patent, in the third year of her reign, also in Appendix to *Strype*, No. 38, after the Act of 1 *Eliz.*, c. 2 (*Eng.*), and 2 *Eliz.*, c. 2 (*Ir.*), the Acts of Uniformity, enforcing the observance of the Liturgy and Ordination Services of *Edw.* 6, gives to the University of Cambridge "According to their ancient custom, power to choose twelve preachers, as before, and

send them to preach through England and Ireland" (omitting Scotland), and that the license of the Ordinaries of the place should not be required; but it makes reservation as to the consent of Rectors, and thus recognises the general rule, thereby dispensed with, respecting the necessity of the license of the Bishop of the diocese; so that this authority of the Diocesan, which existed before the Reformation, was not intended to be interfered with by the Ordination Services of *Edw. 6*, established by the then recent Act of Uniformity, 1 *Eliz.*, c. 2, (*Eng.*), it being thus distinctly recognised by Elizabeth's charters. The privileges granted to the University of Oxford were of an earlier origin, and seem to be referred to by the notes of *Lyndwood*, already mentioned; but all these concessions to the Universities prove the existence of the rule already mentioned, respecting the Bishop's authority, and related mainly, if not only, to occasional preachers. The Liturgies and Services of *Edw. 6* were adopted in Ireland, and enforced by the Act of 2 *Eliz.*, c. 2, as in England, by 1 *Eliz.*, c. 2; and the complete union of the Churches of England and Ireland, in respect of doctrine, if not discipline, is more fully discussed and established by Mr. *Stephens*, in his very able opinion on *The Repeal of the Twenty-ninth Canon (Eng.)*, beginning at p. 45 of the 8vo printed copy. By the fifth article of the Act of Union, 40 *G. 3*, c. 38 (*Ir.*), 5th August 1800, it is enacted that the Churches of England and Ireland, as now by law established, be united into one Protestant Episcopal Church, to be called "*The United Church of England and Ireland*," and that the doctrine, worship, discipline and government of said United Church shall be, and shall remain, in full force for ever, *as the same are now by law established for the Church of England*; and that the continuance and preservation of said United Church, as the Established Church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the Union." These articles had been first adopted and enacted by 39 & 40 *G. 3*, c. 67 (*Eng.*), 2nd July 1800; and thus the Churches of England and Ireland as separate Churches *have ceased to exist*, there being now only "*The United Church of England and Ireland*" known to the law, and which United Church is to be subject to the discipline and government of the Church of England *as it existed before the Union*, subject, of course, to subsequent legislation by the Imperial Parliament.

This right of the Bishop of the diocese to control the Incumbent, in the admission of other clergymen to preach in his diocese, was recognised by the Legislature, by the Act of 5 *Rich. 2*, c. 5, A.D. 1382, the first Act against the Lollards or Wickliffites; which recites that there were divers persons preaching through the country

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"without the license of the Holy Father the Pope, or the Ordinaries of the place, or other sufficient authority, preaching daily in the churches and churchyards, &c., &c., which preachers, cited or summoned before the Ordinaries of the place, &c., will not obey their summons and commandment, nor care for the monitions or censures of the Holy Church, but expressly despise them," &c.; and then enacts as therein, for their arrest and punishment. As such persons preached in churches, it must have been with consent of the Incumbents; and the declaration of the law applies to such. This was followed by 2 *Hen.* 4, c. 15, A.D. 1400-1, which recites that persons preach, &c., "and that the Diocesans of the realm cannot, by their spiritual jurisdiction, without the aid of the Crown, sufficiently correct them, because they go from diocese to diocese, and will not appear before the Diocesan; and enacts that none within the said realm, or any other dominions subject to the King, presume to preach openly or privately, without license of the Diocesan of the same place first required and obtained; Curates in their own churches, and persons hitherto privileged, and other of the Canon Law granted, only excepted;" and then enacts other restrictions and penalties. This Act of 2 *Hen.* 4 included private as well as public preaching, for which former a license had not seemingly been previously required; but in other respects adopted the Ecclesiastical Law on the subject of preaching, and enforced it by severe temporal penalties, in addition to those of the Church. The exemption of the "Curates in their own churches, and persons *hitherto privileged*, and other of the Canon Law granted," from the provisions of the Act, was a distinct recognition of the rules of the Ecclesiastical Law respecting the Bishop's authority, already stated, inasmuch as the privilege is recognised as already existing; and no such privilege could have existed if there had not theretofore been an exclusion of all others, not authorised by the Bishop, unless exempted from his authority in that respect by privilege. The Act of 2 *Hen.* 4, like that of 5 *Rich.* 2, applied to persons who preached in churches as well as in other places; and, as such persons could not have preached in churches without the permission of the Incumbents, the case of occasional preachers in churches is met by these Acts which declared the Common Law, and enforced same by temporal punishments. Though the Acts of 5 *Rich.* 2, c. 5, and 2 *Hen.* 4, c. 15, were passed in England, they comprehended Ireland, under the words "within the realm, and all other dominions subject to His Majesty." It was not uncommon, at that early period, for the English Parliament to legislate for Ireland; and these Acts of 5 *Rich.* 2 and 2 *Hen.* 4 appear, by subsequent Irish Acts, to have been received

here. The 2 *Hen.* 4 was repealed by the 25 *Hen.* 8, c. 14 (*Eng.*), by which the earlier English Acts of 5 *Rich.* 2 and 2 *Hen.* 5, c. 7, against heresy, were confirmed, and other provisions made on the subject of heresy. But the 25 *Hen.* 8 did not further interfere with the laws relating to the licensing of preachers, which were then left as they had been prior to 2 *Hen.* 4, to be dealt with by the Ecclesiastical and Common Law of the Church, unaffected by legislative control, save by 5 *Rich.* 2, and its recital. The repeal of 2 *Hen.* 4, by 25 *Hen.* 8, c. 14 (*Eng.*), was deemed sufficient for its repeal in Ireland; for 3 & 4 *Phil. & Mary*, c. 9 (*Ir.*), provides that the Acts of 5 *Rich.* 2, 2 *Hen.* 4, c. 15, and 2 *Hen.* 5, c. 7 (all *Eng.*), concerning the suppression of heresy, should, "from the first day of the present Parliament, be *revived*, and be in full force and effect for ever." The 2 *Eliz.*, c. 1, s. 4 (*Ir.*), not only repealed the 3 & 4 *Phil. & Mary*, but also the recited and revived Acts of 5 *Rich.* 2, and 2 *Hen.* 4, c. 15, and 2 *Hen.* 5, c. 7, and thus restored the Common Law of the Church in Ireland, as in England, respecting preachers, save so far as altered by the restoration of the supremacy of the Crown, and the Reformation, by which the special privileges flowing from the Pope and his encroachments were extinguished.

According to this restored Common Law of the Church of England and Ireland, enforced, as it had been, for upwards of 130 years by the Act of 2 *Hen.* 4, no person could have lawfully preached in any church without the authority of the Bishop of the diocese, express or implied, or of the Archbishop, unless exempt therefrom by such privilege (if any) as might be valid after the Reformation, or after that period might have been conferred by the Crown; and though the circumstances of a clergyman having been ordained, and formerly licensed in a diocese, would have rendered less particularity necessary in respect of his qualification, on the part of an Incumbent about to avail himself of his occasional assistance, it did not deprive the Bishop of his authority and right to prevent his acting. Even such a clergyman, if he had left the diocese for a length of time, would seem to have placed himself in a position of those called "strangers," and be affected by the peculiar canons applicable to that class: *Lyndwood's Gloss. H, verb. non fuerit de Peregrinis clericis.*

If a clergyman not beneficed or licensed in a diocese had been expressly prohibited by the Bishop thereof from preaching or officiating therein, and should have afterwards acted in disobedience of such prohibition, he would, as before, have been guilty of a contempt of the Bishop's authority, and punishable accordingly; and the Incumbent who, knowing of such prohibition, had admitted him so to preach and officiate would have been guilty of, and punish-

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able for, an ecclesiastical offence. This seems to be plain, as well by reason of the position and authority of the Bishop in his diocese (already mentioned), and the necessary consequences thereof, as from the express and positive declarations of the canons. Suppose such a person had been merely licensed by the Bishop to preach through his diocese, without having been appointed to any particular cure, the Bishop might, according to the law already stated, have revoked that license at his will and pleasure; which would have been useless if, notwithstanding such revocation, the clergyman in question could not have been prevented from afterwards preaching in the diocese without a suit in the Ecclesiastical Court. An implied authority, resulting from usage, could not have been of greater force than an express license or authority, and must have been subject to a similar power of revocation. The consent of the Incumbent to allow of the strange clergyman preaching in his church would have been necessary in either case, whether the Bishop's permission to the stranger to preach were express or implied. Again, an unlicensed clergyman could not have stood in a better position than a Bishop, who had a general authority to preach everywhere, yet was obliged to succumb to the prohibition of the Bishop of another diocese, in case he should have thought fit to prevent the strange Bishop from preaching in his diocese. It would certainly appear to be very strange if a Bishop—considered to have, by Apostolical authority, a commission to preach everywhere—might have been prevented from doing so in a particular diocese by an express prohibition from the Bishop thereof; yet that he could, by his license, have empowered a third person, of inferior status, and with more limited authority, to do the very act in defiance of that authority which had been sufficient to curtail his own powers; and it would have been stranger still if a Bishop of a diocese could have excluded a brother Bishop, by an express inhibition, from preaching in his diocese, and that he could not have dealt in a like manner with a mere Priest or Deacon. On the whole, therefore, it appears to have been the clear, settled Common Law of the Church, that no clergyman could have lawfully preached in any diocese without the sanction of the Bishop thereof, unless privileged or licensed by some superior Ordinary, as already mentioned, up to the repeal of 2 *Hen. 4*, c. 15, by the 25 *Hen. 8*, c. 14 (*Eng.*): and this law was not only not contrariant to the laws of the realm, but was adopted by the Legislature as the basis of several important enactments.

Such being the state of the law at the time of the repeal of 2 *Hen. 4*, c. 15, it was continued, except in respect of the Pope's

powers and privileges conferred by him, by the Acts of 25 *Hen.* 8, c. 19 (*Eng.*), and 28 *Hen.* 8, c. 13 (*Ir.*). By the English Act of 25 *Hen.* 8, c. 19, the King was authorised to appoint Commissioners to revise the ecclesiastical constitutions and canons, with a view of retaining all such as should be approved of, and of abrogating all such as should be disapproved of; and by section 7, it is enacted, "That such canons, constitutions, ordinances, and synodals provincial being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were upon the making of this Act, till such time as they be viewed, searched, or otherwise ordered and determined by the said Commissioners, according to the tenor, form and effect of this present Act." The authority to issue such a commission, conferred by that Act, having expired, it was renewed by the 7 *Hen.* 8, c. 15, and again by the 35 *Hen.* 8, c. 16, for the King's life. And by the 3 & 4 *Edw.* 6, c. 11, similar powers to appoint Commissioners for the like purpose were conferred on the King, to endure for three years. In pursuance of the foregoing statutes, Commissioners were appointed, who made the compilation of Ecclesiastical Laws, called *Reformatio legum Ecclesm.*, which never was established as law, though it be valuable for reference. The Irish Act of 28 *Hen.* 8, c. 13, made against the authority of the Bishop of Rome, enacts, by section 10, "That notwithstanding the preceding provisions of the Act, every Archbishop, Bishop, &c., shall and may use and exercise, in the name of the King only, such canons and constitutions, ordinances and synodals provincial, being already made for the direction and order of spiritual and ecclesiastical causes, which be not contrariant or repugnant to the King's prerogative royal, in such manner and form as they were used and executed before the making of this Act, till such time as the King's Highness shall order and determine, according to his Laws of England, such order and determination as shall be requisite for the same; and the same to be certified either under the King's Great Seal, or otherwise ordered by Parliament." And section 9 provides that "nothing in the Act shall prejudice or be hurtful to the ordinances for the discipline and order of the Church of Ireland, as theretofore used and adopted." Unless, therefore, this jurisdiction and authority of the Bishop, in respect of persons who shall preach and officiate in his diocese, has been taken away or modified by some subsequent canons, statutes, ordinances or usage, it must be taken to be in full force, as it was at the repeal of the 2 *Hen.* 4, c. 15.

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There was no disposition on the part of the Crown, or those in authority during the remainder of the reign of King *Henry 8*, or in that of *Edward 4*, or of *Elizabeth*, to relax the laws imposing restraints on preachers. On the contrary, the right to preach was, during such reigns, placed under very strict regulations, by means of proclamations and injunctions from the Crown.

Whether by reason of the troubled state of the country, the ignorance of the inferior clergy, or their indisposition to the changes made by the Reformation, or for other reasons, the prerogative of the Crown in respect of its supremacy was stretched to the utmost. At one time the prohibition was, that no person should preach unless licensed by the Crown or the Archbishop of Canterbury, or Bishop of the diocese, save the beneficed clergy in their cures. At another time the restriction extended so far as to prevent even the beneficed clergy from preaching without a license, by prohibiting all not licensed either by the Crown or the Archbishop of Canterbury or York, or the Bishop of the diocese, from preaching. Some of these injunctions are set forth in 3 *Wilk. Concilia*, pp. 21, 27, 51, and elsewhere. By none of them was any increased privilege conferred on the clergy, nor any authority of the Bishop of the diocese curtailed; save perhaps in the reign of *Edw. 6*, when even Bishops were directed not to grant licenses to preach—the proclamation reserving that privilege to the King and Archbishop of Canterbury. This brings us on to the reign of *Jac. 1*—when in 1603 a Convocation of the Archbishop, Bishops, &c., of the province of Canterbury was summoned and empowered to confer, treat, debate, and agree of and upon such canons, orders, ordinances and constitutions as they should think necessary, fit and convenient, “for the honour and service of God, the good and quiet of the Church, and the better government thereof, to be from time to time observed by the Archbishop, &c., &c., of and within the province of Canterbury.” The canons of 1603 were framed by that Convocation, and presented to the Crown for approval, and its assent was prayed thereto, according to the form of 25 *Hen. 8*, and by the royal prerogative and supreme authority in causes ecclesiastical. Though the canons were framed for the province of Canterbury, the patent of confirmation, after reciting that they would be profitable to the whole Church of the kingdom, gives the King’s assent thereto, according to the form of the said statute (*viz.*, under the Great Seal); and proceeds further, by the royal prerogative and supreme authority as aforesaid, to confirm same, and commands them to be observed, executed, and kept, both within the provinces of Canterbury and York—though there

was no mention of any Convocation at York;\* and if there were none such, their binding efficacy in the province of York would depend solely on the mandate of the Crown made in 1603. By the reference to the Act of 25 *Hen.* 8, c. 19, it might be inferred that the object was to retain so much of the ancient Canon Law as is mentioned and declared in that collection (as was designed by 25 *Hen.* 8), without proceeding to abrogate the other portions thereof, which were not contrary to the laws of the realm—all else having ceased to have any force.

The canons of 1603 were framed and sanctioned by the Crown, whilst the injunctions of *Elizabeth* were in full force, if not in practical operation; and there is no reason, *a priori*, to suppose, from the commission or ratification thereof by the Crown, that the framers thereof, in convocation, intended to depart from the ancient laws of the Church, or the spirit of these injunctions, by depriving Bishops of any portion of their authority, or increasing that of the beneficed clergy. By the canons from No. 31 to 35 inclusive, regulations are made for the ordination of the clergy, adopting all the rules on the subject already mentioned as those of the Church in general, adapting them to our Reformed Church. The 36th canon then directs, that no person shall be received into the ministry, nor, either by institution or collation, admitted to any living, nor suffered to preach, catechise, or to be a lecturer or reader of Divinity, in either University, or in any cathedral or collegiate church, city or market-town, parish church, chapel, or in any other place within this realm, except he be licensed either by the Archbishop or by the Bishop of the diocese where he is to be placed, or by one of the two Universities, and except he shall first subscribe the three following articles, viz.:—

First; Supremacy of the Crown and Negation of Foreign Power.

Second; Adherence to the Book of Common Prayer.

Third; Adoption of Thirty-nine Articles.

This 36th canon adopts fully the ancient law of the Church, already mentioned, but superadds the necessity of subscription to the three articles in question, and in terms comprehends all preachers. It then decrees that, if any Bishop shall ordain, admit or license any except he first have subscribed as aforesaid, he shall be suspended from giving orders and licenses to preach, for twelve months; thus depriving the Bishop of any discretion to dispense with the law.

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\* *Burn*, in his Preface, p. 26, states, that "they were also received and passed about two years afterwards in the province of York;" but does not mention any subsequent or further order of the Crown.

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The 37th canon is, that none licensed as aforesaid to preach, read, lecture or catechise, coming to reside in any diocese, shall be permitted there to preach, read, lecture, catechise, or minister the Sacraments, or to execute any other ecclesiastical function, by what authority soever he be thereunto admitted, unless he first consent and subscribe to the three articles before mentioned, in presence of the Bishop of the diocese wherein he is to preach, read, lecture, catechise, or administer the Sacraments as aforesaid. This is merely supplemental to the 36th canon, and provides for the case of a person licensed to preach, &c., by the Archbishop or one of the Universities, coming into a diocese where he shall have obtained an appointment, in which case he shall not be permitted to act till he shall have again subscribed to the three articles before the *Bishop of the diocese*; and is rather in affirmance of the authority of that Bishop, and agreeable in principle with the ancient law, but it is compulsory on the Bishop.

The 39th, 40th and 41st canons regulate institution to benefices and residences on the ancient principles of the Church; and the 42nd, 43rd and 44th enforce residence and preaching in the case of Deans and Prebendaries, in respect of their cathedrals and benefices—the diocesan authority being throughout preserved.

The 45th canon orders every beneficed man, allowed to be a preacher, to preach one sermon every Sunday of the year, in his own cure, or in some other church or chapel, where he may conveniently, near adjoining (where no preacher is), wherein he shall soberly and sincerely, &c. This does not give him any authority, directly or indirectly, to preach or officiate in another diocese, if not permitted to do so. "Where he may conveniently" might be construed in an opposite sense; but merely enforces a performance of his duty, and localises it.

The 46th canon then orders that every beneficed man, not allowed to be a preacher, shall procure sermons to be preached in his cure once every month, at the least, by preachers lawfully licensed, if his living, in the judgment of the Ordinary, will be able to bear it; and upon every Sunday when there shall not be a sermon preached in his cure, he, or his Curate, shall read a homily. By this 46th canon provision was made for a certain limited class of occasional preachers, the necessity of whom was to be decided on by the Ordinary, and who must have been, or be, preachers, licensed; viz., by the Archbishop, one of the Universities, or the Bishop of the diocese, and who, by the 37th canon, must have first subscribed articles before the Diocesan.

The 47th canon provides that every beneficed man, lawfully non-

resident, shall cause his cure to be supplied by a Curate, that is a sufficient and licensed preacher, if the worth of the benefice will bear it.

The 48th canon is, that no Curate or Minister shall be permitted to serve\* in any place, without examination and admission of the Bishop of the diocese, or Ordinary of the place, having episcopal jurisdiction, under his hand and seal, having respect to the cure and meetness of the party. The 48th then proceeds further to order that Curates or Ministers shall not be admitted to other dioceses, whither they shall remove, without testimony from the Diocesan or Ordinary of the place whence they came, in writing, of their honesty, ability and conformity to the Ecclesiastical Laws of the Church of England: thus taking every precaution against the admission of unfit clergymen to serve in the Church, exactly as done by the ancient canons, irrespective of their mere orders. This 48th canon seems, in its terms, to apply to clergymen appointed to serve cures, rather than to those occasionally acting for the clergy having permanent cures; and this appears to have been the view of Sir J. Nichol in *Gates v. Chambers* (a).

The canons which are more immediately applicable to what have been called "occasional preachers" are the 50th, 51st and 52nd, read in conjunction with the 36th and with the 49th canon, which directs that no person whatsoever, not examined and appointed by the Bishop of the diocese, or not licensed, as aforesaid, for a sufficient or convenient preacher, shall take upon him to expound in his own cure, or elsewhere, any Scripture or matter of doctrine, but shall only read homilies, &c. This seems to adopt so much of the Constitution of *Arundel* as begins with, "But let Parish-priests and temporary Vicars (not perpetual), who are not sent in form aforesaid, only preach those things contained in the Constitution of *John Peccham*, as a supply to the ignorance of Priests," substituting homilies for *Peccham's Heads or Directions* (b); and probably the 49th canon was only intended to apply to Deacons, who might, at that period, have been admitted to benefices, as sanctioned by 13 *Eliz.*, c. 12, s. 3.

The 50th canon is, that neither the Minister, churchwardens nor any other officers of the church, shall suffer any man to preach within their churches or chapels, but such as, by showing their license to preach, shall appear to them to be sufficiently authorised

(a) 2 Ad. Rep. 189.

(b) 2 Johns., 282, 460.

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\* The Latin canon, as set forth in 2 Ad. Rep., p. 189, uses the words "*Ullibi curæ animarum inservire.*"

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thereto as aforesaid, viz., licensed to preach by the Archbishop of the province, Bishop of the diocese, or one of the Universities. For no other Bishop's license conferred an authority to preach in a different diocese, and no license to preach is mentioned in the 36th or any preceding canon, save those of the Archbishop, Bishop of the diocese, or one of the Universities. The 51st prohibits the admission of strangers to preach in cathedral or collegiate churches, except they be allowed by the Archbishop of the province, or by the Bishop of the same diocese, or by one of the Universities; and this clearly applies to occasional preachers in cathedrals.

The 52nd canon is, "That the Bishop may understand, if occasion so require, what sermons are made in every church of his diocese, and who presume to preach without license; the churchwardens and sidesmen shall see that the names of all preachers which come to their church from any other place be noted in a book which they shall have ready for that purpose, wherein every preacher shall subscribe his name, the day when he preached, and the name of the Bishop of whom he had license to preach." This has been relied on by Counsel, to show that the authority of the Bishop of the diocese has been, to some extent, superseded; and that the license of any Bishop would be a sufficient authority for a stranger to preach in the diocese of another Bishop, though forbidden by him so to do. But reading the 50th, 51st and 52nd canons together would seem to preclude this view. The 50th, by the words, "by showing their license to preach shall appear unto them to be sufficiently authorised thereto, as is aforesaid," appears to mean licensed and authorised as in the 36th and 49th canons mentioned. The 51st, in respect of occasional preachers in cathedrals, expressly specifies the license as required by the 36th canon supporting this view of the 50th canon. The 52nd canon gives no authority beyond that conferred by the 50th and 36th canons, and was framed to supply the Bishop with information as to the sermons preached in his diocese, and as to who should presume to preach without license, in violation of the 50th canon. The words at the end of the 52nd canon, viz., "the name of the Bishop, by whom he had license to preach," have been particularly relied on to show that any Bishop might give a license to preach, which would be operative in any other diocese; but to give such effect to the words as to divest the local Diocesan of his authority over preachers in his diocese, without any such intent being declared, would violate every rule of construction; clear words would be required for such a purpose; inferences and presumptions, such as suggested in argument, would not suffice to change the Common Law of the Church,

or to divest rights. But these words may be satisfied by holding them to mean "the *authority* of whom he *had* license to preach;" otherwise an entry of a license from the Archbishop or either University, need not be made. If the name of the Archbishop or University were not intended to be entered, it would seem then that those licensed by strange Bishops were designated as those presuming to preach without license of the Bishop of the diocese, and guilty of contempt. It is said, in *Creswick v. Rokeby* (a), that the churchwardens might themselves enforce the authority conferred on them by the 50th canon. As the canons were not ratified by statute, it would scarcely have been in the power of Convocation or Crown, after 25 *Hen.* 8, c. 19, to have deprived the Incumbent of the legal right (if ever he had such) to admit any clergyman, in Priest's orders, to preach in his church without permission of the Bishop, and to clothe the churchwardens and sidesmen with power to control him, as directed by the 50th and 52nd canons; and such power would not have been increased if the canons, so far as the province of York, in which the case in 2 *Buls.* arose, is concerned, rested solely on the King's mandate having been made by the Provincial Council of Canterbury alone. But if the Incumbent had no such legal right up to 1603, and if the Bishop might have prevented any strange clergymen from preaching in his diocese, there would have been nothing extraordinary in enabling the churchwardens to act for the Ordinary, as they do in respect of seating the parishioners; and thus the canon would be one for merely enforcing existing rights by new machinery, instead of depriving an Incumbent of his legal authority, and transferring it to lay officers of his church. The words in the 52nd canon, "that the Bishop may know who presume to preach 'without license,'" &c., support this view, and show that it was in support of the Bishop's authority the churchwardens were to act, and not for the parishioners, who had no legal right to interfere in the matter. If the 48th canon did not refer to "occasional preachers," the 50th and 52nd would appear to have been passed to exclude all not having a license as required by the 36th canon, or by the Common Law and ancient canons of the Church. The 71st canon prohibits the preaching or administration of the Holy Communion in "private houses," described to be "those wherein are no chapel dedicated and allowed by the Ecclesiastical Law of the realm," viz., unconsecrated buildings.

No extension of these canons was made to Ireland by the Crown; but in 1634 a General Convocation of all the Bishops, &c., in Ireland was assembled, and this National Synod was authorised, by

(a) 2 *Buls.* 49.

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*Car. 2*, to treat and confer upon such articles, canons, &c., as they shall think necessary and fit for the honor and service of God, rooting out of heresies, procuring the good and quiet of the Church, and preservation of the good government in causes ecclesiastical, as also to set down ordinances and decrees to have such force and effect as *other canons and constitutions of the Church* have; and the same (our royal assent being first had) to set forth and publish;” rather showing that the “other canons and constitutions” were to remain as before, unless altered by some new canon. By this Synod, the canons of 1634 were prepared and presented, and the assent of the Crown thereto prayed, according to the form of the statute made in that behalf (*viz.*, 28 *Hen. 8*, c. 13), and by his prerogative royal and supreme authority in canons ecclesiastical; and they thereupon were ratified and established. The 1st canon proclaims the agreement of the two Churches, neither being dependent on the other, in the confession of the same Faith and the doctrine of the Sacraments, and receives and approves of the Thirty-nine Articles agreed upon in the Convocation in London, 1562, and which had been previously thereto generally received in the Church of Ireland, as stated in the 31st canon. These canons are not so numerous as the English canons, being only 100 in number, whilst the English are 141; nor do they purport to have any other object than that expressed as aforesaid. The Irish canons of 1634, on the subjects under discussion, are similar to the English canons of 1603, save that in the Irish canons the only person expressly referred to as competent to license or authorise preachers is the Bishop of the diocese. The 9th (*Ir.*), like the 45th (*Eng.*), requires every beneficed man allowed to be a preacher to preach every Sunday in his own cure, omitting the words of the 45th, “or in some other church or chapel, where he may, conveniently near, adjoining where no preacher is.” The substance of the 36th and 37th (*Eng.*) is contained in the 31st and 32nd (*Ir.*), save in respect of the license to preach, not required in express terms by the 31st and 32nd (*Ir.*), and the 38th follows the 48th (*Eng.*), beginning “no Curate.” The 39th (*Ir.*), prohibiting the admission of strangers to preach, uses the words “unless sufficiently authorised as aforesaid,” instead of “by showing their license as aforesaid,” as in the 52nd (*Eng.*); and contains the injunction as to preachers of erroneous doctrines, contained in the 51st (*Eng.*). The words “authorised as aforesaid” seem to refer to the authority required by the 38th canon, *viz.*, Bishops of the diocese, which is also required by the 27th (*Ir.*), for cathedral preachers, whereas, by the 51st (*Eng.*), cathedral preachers may be allowed by the Archbishop, or Bishop, or one of the Univer-

sities ; it does not appear that the Irish University ever had power to license preachers. The 21st (*Ir.*), prohibiting preaching in private houses, follows the 71st (*Eng.*). There is no Irish canon as to a preacher's book, but there is no substantial difference between the two sets of canons, save that the English are more numerous, and enter more into details. These canons of 1603 and 1634, in the particulars mentioned, merely embody the Common Law and ancient canons of the Church, adapted to the circumstances of that Church as altered by the Reformation and subsequent statutes. They do not purport to do more than provide for certain limited branches of Church government and discipline, leaving several matters, many of them of daily practice, to be regulated by the more ancient canons and Common Law of the Church—by the authority whereof the oath of canonical obedience, taken at institution, is enforced at this day. The regulations with respect to the preaching of strangers in any diocese, imposed by those canons, are few ; and even if the 48th (*Eng.*) and 38th (*Ir.*) do not apply to occasional preachers, in the sense relied on by the impugnants here, and the Bishop be left, in respect of such preachers, unfettered by the 36th English canon, he would still be in possession of his jurisdiction and authority, as it existed, independently of and unaffected by these canons. It may be doubtful whether the 48th (*Eng.*) and the 38th (*Ir.*) canons respectively apply, or were intended to apply, to occasional preachers ; but there is nothing in either of them, or in the other canons, to deprive the Bishop of any of his authority ; and the arguments founded on them cannot be extended further than that the case has been left unprovided for by these canons ; so that the Bishop may exercise his authority according to his own discretion, though he may not have acquired any additional powers from such canons.

An argument was strongly urged, by the advocates of impugnant, to show the canons only required that a preacher should be licensed by a Bishop of any diocese, and that the license of the particular Diocesan was unnecessary, founded on a supposed opinion of *Watson*. The English Act of 13 *Eliz.*, c. 12, "An Act for the Ministers of the Church to be of Sound Religion," by section 6, enacts, that none should be admitted to a benefice above the value of £30 in the King's books, unless he should be a Bachelor of Divinity, or a preacher lawfully allowed by some Bishop within this realm, or by one of the Universities of Cambridge or Oxford.

*Watson*, in the 1st, 2nd and 3rd editions, applies the decision, by 7th resolution, in *Browne v. Spence (a)*, that the license of any Bishop was sufficient, solely to the 6th section of 13 *Eliz.* ; adding, "that a preacher, by the canons, must have license from the

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(a) 1 Kelb. Rep. 502.

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Bishop of the diocese"—In the 6th section of 13 *Eliz.* merely settling the qualification of the persons to be admitted to livings of a certain value, and who would thus gain, by institution, permission from the Bishop of the diocese to preach, &c. The observation of *Watson*, as to the limitation of *Browne v. Spence* to the Act of *Eliz.*, and of a preacher, by canon, requiring a license, &c., has been omitted in the 4th edition, and the words run, "but a license of the Bishop of any diocese is sufficient," as if generally applicable. This has been relied on in argument to prove that *Watson* changed his opinion, and intended to lay down that, by the canons of 1603, or the general law of the Church, a license of any Bishop was sufficient to authorise a clergyman to preach in any diocese. But this edition was published after *Watson's* death, and so was the 3rd edition, which contains the observations as originally published by *Watson*, and altered in the 4th edition; so that even the opinion of *Watson* cannot be relied on to controvert the general doctrine adverted to, though the passage in the 4th edition should bear the interpretation sought to be put on it, which it would not seem in fairness to do.

So matters remained (passing over the troubled times), until the 13 & 14 *Car. 2*, c. 4 (*Eng.*), A.D. 1662, was passed, when preachers had not increased in favour with the Crown, or the leaders of the Government party of that day. Throughout that Act of Uniformity there are clauses to exclude all but good Episcopalians and Royalists from the Church and from the pulpit. Section 19 enacts, that no person shall be or shall be received as a lecturer, or permitted, suffered or allowed to preach as a lecturer, or to preach or read any sermon or lecture in any church or chapel, or other place of public worship within this realm of England, unless he be first approved and thereunto licensed by the Archbishop of the province, or Bishop of the diocese, or, in case the See be void, by the Guardians of the Spiritualities, under his seal, and shall, in the presence of the same Archbishop, Bishop or Guardian, read the Thirty-nine Articles, with declarations of his unfeigned consent thereto. The section then proceeds to provide more specially for lecturers. It is enacted, by the 22nd section, that Common Prayer and service for the day shall be read before any sermon or lecture be preached. By the Act of *Car. 2*, it seems that the ancient privilege of the Universities, recognised and mentioned in the 36th and 51st canons, was superseded, unless it has been preserved by 13 *Eliz.*, c. 12. The Irish Act of Uniformity, of 17 & 18 *Car. 2*, c. 6, A.D. 1695, follows that of England almost *verbatim*, in the clause material to be considered in this case: sections 13 and 16, as to preachers,

and the necessity of having the service before the sermon, following sections 19 and 22 of the English Act on the same subject; and section 9 being similar to section 24 of the English Act. The 22nd section of the English Act, and 16th of the Irish, most plainly refer to occasional as well as other lectures or sermons, and have been always so construed. The 13th section of the Irish, and section 19 of the English Act, are, in their terms, in like manner, applicable to all preachers. *Watson* observes thus, on the 19th section of the English Act, viz., "and note, every person when he is ordained Priest doth thereby receive authority to preach the Word of God;" and when he is instituted "the Bishop doth commit to him the cure of souls."—*Sheppard*, in his *Sure Guide for the Justices of the Peace*, saith that the clause in the statute 14 *Car. 2*, concerning lecturers, seems to extend to all ministers that preach anywhere without a license," the words of which are (*Pro-ut*). "And although," *Watson* proceeds, "as I conceive, the clause was only designed for such who are to preach in the quality of lecturers, yet it may be extended to all Ministers preaching in any church or chapel, or any place of public worship, of which the preacher hath not the cure, though he be not a settled and constant lecturer; and even before the statute it was lawful for churchwardens to restrain any stranger, not licensed, from preaching in their church or chapel; which seems to be allowed in *Creswell v. Rokeby*" (a). There would, no doubt, be great difficulty and inconvenience in extending the canons and statute so far as to make it imperative on every clergyman, preaching an occasional sermon in a strange diocese, to have a license under the seal of the Bishop of the diocese. In *Gates v. Chambers* (b), Sir J. Nichol expresses great doubt on the subject of the applicability of the canons to such a case, but he does not refer to the statute. In that case, a clergyman of a neighbouring diocese had been invited to preach and officiate for an Incumbent who had dismissed his Curate, and who was obliged to be absent, to attend his sick wife; but, on his going to the church for the purpose, he was opposed in his attempt to officiate for his friend by the Curate, who alleged that he had been illegally dismissed. Mr. Chambers, however, persevered, and preached and officiated for his friend. The Bishop had made no objection to Mr. Chambers so acting; but the office of the Bishop was promoted by the Bishop's secretary, at the instance of the Curate, and two charges were made:—first, for violating the 48th canon, by officiating without license of the Bishop, or other competent authority; secondly, for

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(a) 10 Jac., B. R., 2 Buls. 49.

(b) 2 Ad. Rep. 189.

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having thereby obstructed a duly licensed Curate in the performance of his clerical duties, in violation of the 48th canon, and against the laws and constitutions ecclesiastical of the realm. So far as can be collected from Sir J. Nichol's observations, his opinion was against applying the 48th canon to such occasional assistance. But the pleading was admitted on other grounds, and the suit was abandoned, and dismissed with costs, so nothing was decided. A different question arises in the present case; for even supposing that the 48th (*Eng.*) and 38th (*Ir.*) canons do not apply to clergymen who only assist an Incumbent by preaching an occasional sermon, impugnant must further establish that the Bishop of the diocese has no power to prevent any such clergyman from so preaching or officiating. He had that power up to 1603 in England, and up to 1634 in Ireland, when those canons were respectively confirmed by the Crown; and if the canons do not refer to such a case, the power remains as before, unless subsequently taken away by statute or usage. The Acts of Uniformity, of *Car. 2.*, may not render a license from the Bishop to enable strangers to preach occasional sermons in his diocese absolutely necessary, though those Acts might be so construed without straining their language. But in no view can they be read as depriving the Bishop of any portion of his jurisdiction or authority in respect of such preachers. The most that can be said of them is that, though they require a license in terms in such a case, it would be very inconvenient so to construe them. The practice which has long prevailed, and still prevails, in most dioceses in England and Ireland, of clergymen obtaining such occasional assistance, without applying to the Bishop for his license or permission in each particular case, was not interfered with further than already mentioned, if at all, by the canons of 1603 and 1634, or the Acts of *Car. 2.* But I cannot find a trace of any practice or usage, or even a *dictum* in any reported case, going to the extent that a Bishop could not, at his mere will and pleasure, without assigning any reason, have prevented any particular stranger from preaching or officiating in his diocese, until licensed; though, in *Martin v. Hinds*, something is mentioned in respect of officiating (which will be noticed hereafter). It was strongly urged, as a reason against such a right being vested in the Bishop, that it might be abused, and the exercise of it made an instrument of tyranny and oppression. But if such a mal-administration of a diocese should ever occur, there is a Visitor in the Metropolitan and Superior Ordinary, who might be able to provide a remedy for such an abuse of power, and to whom the Suffragan takes an oath at his consecration, in the following words:—"I —— do profess and pro-

mise all due reverence and obedience to the Archbishop and to the Metropolitan Church of \_\_\_\_\_ and their successors.—So help me God. Through Jesus Christ.” Besides which there are powers in the Crown which might be brought into operation. On the other hand, if every Minister should be at liberty, as he pleased, to admit any other clergyman to preach and officiate in his parish, in defiance of his Bishop, leaving the Bishop the mere power of punishing the stranger for unorthodox opinions, when proved to have been delivered, it is possible that very great abuses might arise, to prevent which there would be no adequate remedy; particularly as the term “occasional” applies to the Incumbent who obtains the assistance, and not to the clergyman who renders it, and who, by means of such a practice, might be enabled to preach and officiate throughout a diocese (though unfit to enjoy such a privilege), in defiance of the Bishop thereof; who, though Bishop and Superintendent of the diocese, and answerable for the cure of souls therein, would thus be deprived of all power, save that vested in every member of the community, of prosecuting an unorthodox preacher, in the Ecclesiastical Court. For if one Incumbent has a right to admit a particular clergyman, not beneficed or licensed in the diocese, to preach and officiate in his church occasionally, whenever he pleases, other Incumbents may do so in succession; and thus a clergyman, objectionable in many respects, though not so unorthodox or so misconducted as to justify a sentence of degradation or suspension in a suit to be instituted for the purpose, might be introduced into a diocese as an almost permanent officiating Minister, in defiance of the Bishop, the chief pastor and superintendent thereof, and in violation of the first principles of Episcopal government and our parochial system. Suppose, for instance, that a Bishop knows, or has good reason to believe, that a clergyman about to preach in his diocese was the author of one of the Oxford Essays, which have been denounced by the English Bishops and our Archbishops, or that he had adopted the opinions therein promulgated, and suppose the Incumbent about to allow him to preach differed from the Bishop, either in respect of the authorship or the heresy, the Bishop, according to the argument here, would have to tolerate the preacher in his diocese until he had instituted a suit, and proved to the satisfaction of the Court that the clergyman in question was the author of the work, or that the opinions were heretical; whereas, if he were presented to a benefice or cure, he might be refused institution or a license, by the Bishop, till his orthodoxy had been decided upon. It would require some clear authority for such a proposition, which would deprive the Bishop of his power to

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prevent the admission of unfit occasional preachers, whilst he is empowered to refuse admission of unfit persons to benefices and cures. Again, supposing the Bishop has good reason to believe that a clergyman is an immoral man, and addicted to habits unfitting him, in the Bishop's opinion, to be a preacher of the Gospel, and that, for want of satisfactory proof, or the fear of the expenses of a heavy suit, neither the Bishop of a diocese where he has a benefice, or, if unbeneficed, where resident, nor any other person, shall have prosecuted him, so as to obtain a sentence of degradation or suspension, the Bishop cannot, according to the argument used here, prohibit such a clergyman from preaching or officiating in his diocese, in case an Incumbent please to admit him so to do. An Incumbent might, perhaps, differ from the Bishop as to the sufficiency of his information and evidence; or, perhaps, not take the same view of the transaction; particularly, if anxious to be absent for a short time from his benefice, and unable to procure the assistance of any other clergyman. All these cases might occur, and will show that as many evils might arise if the Bishop had not the power claimed, and perhaps more than if he had such. In point of fact, a clergyman, named Taylor, was inhibited by Archbishop Magee, on suspicion of his entertaining infidel opinions, and which suspicions were subsequently verified by public lectures delivered by him in London. If the argument here be valid, Mr. Taylor might have continued to preach in Dublin, in defiance of the Archbishop, who would thus have been deprived of all episcopal power in respect of occasional preaching. However, rights cannot be decided on such speculations.

Considerable stress was laid in argument on the Thirty-nine Articles, and the Ordination Service, as now in use; and it has been urged that the practice of granting general licenses to preach has fallen into disuse, by reason of that service, and that such disuse of general licenses had conferred full authority on every clergyman in Priest's orders to preach whenever he may be permitted by any other clergyman so to do. But no material change has been made in the Ordination Service, on this subject, since the 5 & 6 *Edw.* 6; and there is nothing in any of the Thirty-nine Articles, nor in the Ordination Service, established since the Reformation, to specify what authority unless it be that of the Ordinary or Diocesan, shall enable a clergyman to preach in any particular place; and there is no general authority conferred thereby, so as to dispense with all diocesan authority or limits of jurisdiction. The Thirty-nine Articles and Ordination Service were in full force when the injunctions of *Elizabeth*, and the canons of 1603 and 1634,

were issued and made; and the two Acts of Uniformity, of *Car. 2*, referred to, enforce the use of such services, which distinctly recognised the parochial and diocesan system. The authority conferred by the 23rd Article declares it is not lawful for any man to take upon him the office of public preaching, or ministering the Sacrament, before he be lawfully *called* and *sent* to execute same by men who have public authority given unto them in the congregation to call and *send* Ministers into the Lord's vineyard. And the 36th declares, that the book of consecration and ordaining of Priests and Deacons, set forth in the time of *Edw. 6*, doth contain all things necessary to such consecration and ordaining. By the Ordination Service of 1549 (3 & 4 *Edw. 6*), the preface whereof requires a Deacon to be not less than twenty-one, and a Priest not less than twenty-four years of age, declares the duties of a Deacon to be to assist the Priest and read Holy Scriptures and homilies in the church, as in the present service, and then proceeds thus, viz.:—"Take thou authority to execute the office of a Deacon in the Church of God, committed unto thee;" and "Take, &c., to read the Gospel in the Church of God, and to preach the same, if thou be thereto ordinarily commanded" (viz., commanded by the Ordinary). In the Ordination Service of the Priest, the promises to teach the people are the "people committed to his charge." And those to banish error, and to monish the sick and whole, are exacted as to "those within *his cure*."

"And the promise to set forth quietness, peace and love among all Christian people is followed by, 'especially among them that are or shall be committed to your charge.'" The authority given was—"To preach the Word of God and to administer the Holy Sacrament in this congregation" (viz., in his cure, and to those committed to his charge). The phraseology is slightly altered in the service of 1552, enforced by the Act of the 5 & 6 *Edw.*, c. 1; the authority being given "To the Priest to preach the Word of God, and minister the Holy Sacraments in *this* congregation where thou *shalt be so appointed*." But, in other respects, the service follows that of 1549. The service of 1559, enforced by 1 *Eliz.*, c. 2 (*Eng.*), 2 *Eliz.*, c. 2 (*Ir.*), was that of *Edw. 6*, 1552. The present service follows that of 1552, with slight verbal alterations; the authority to the Deacon being, to read the Gospel in the "Church of God, and to preach the same if thou be thereto licensed by the Bishop himself"—not the Ordinary, as before. The authority to the Priest is, "To preach the Word of God and to minister the Holy Sacrament in the congregation where thou shalt be lawfully appointed thereunto." In other respects they do not differ. So the discon-

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tinuance of the practice to grant the more general license to preach, without restriction as to locality, cannot, in good reason, be attributed to any general authority conferred by the Ordination Service, which has not varied. It would be more satisfactorily accounted for by the improved education of the clergy having rendered such licenses unnecessary. No authority could grant such general licenses, but the Crown, the Archbishop and the Universities. The Bishop could grant a license to preach, limited to his own diocese; but no Bishop could have granted a license enabling a clergyman to preach in another diocese, without permission from the Diocesan thereof. When the Crown, Archbishop and Universities ceased to give general licenses to preach, there remained no authority to conflict with that of the Diocesan; but it is difficult to understand the argument that, by reason thereof, the authority of that Diocesan was entirely superseded, and that every clergyman, ordained by himself or by any other Bishop, thereupon acquired the right of preaching in any diocese to which he might be invited by any Incumbent, in defiance of the Bishop thereof, though actually inhibited by him.

The practice to be collected from the forms of collation, institution and license, formerly and still in use, is in accordance with the ancient law of the Church and the Ordination Service; and it is a mistake to say that the practice of licensing preachers, who are not beneficed (save the practice of granting the general licenses, irrespective of locality), have ever fallen into disuse, which it should have done if the Ordination Service conferred general authority to preach. The forms of institution and collation now, and for upwards of two centuries, in use in Ireland, run thus, after giving the benefice, viz.:—"And we do commit to you the care and government of the souls of the parishioners of the said," &c. There is no special mention of preaching, or ministering Sacraments, or other duties, all being, as of old, included in the cure of souls. But in the license to serve perpetual cures, the words are:—"To serve the cure of souls within, &c., to *preach* the Word of God, and to administer the Sacrament, &c., there." And so in the licenses to Assistant-curates, the authority is "to perform the office of Assistant-curate, or to assist in serving the cure of souls of the parish aforesaid, to *preach* the Word of God, and administer the Sacrament, &c., *within the same*." When the Assistant-curate was only to read prayers, the license ran thus, viz.:—"To read prayers as his assistant." Mr. Miller's institution is in the above form, and Mr. Potter had a license to preach as Assistant-curate in the Chapel-of-ease of Cushendun, diocese of Down and Connor, and now has a license, in the above form, of Perpetual Curate, and a license to

preach in Newtownbarry, in the diocese of Leighlin. His right to preach there depended on that license, and not of that for Cushendun, in the diocese of Down and Connor. His own 5th Article, already adverted to, would prevent his now relying on the latter license, even in Down and Connor. The forms in use in England, of licenses of Curates, contain, like those in Ireland, authority to preach in the particular cure. But the form of institution, as given in 2 *Burn*, p. 167, differs in phraseology from the form in use in Ireland, though substantially they are similar. The English form runs thus:—" *Instituo te ad habere curam animarum, et accipe curam tuam et meam.*" The latter words are in accordance with the position that the Bishop has the cure of souls in every parish, and confers it on the Incumbent by institution. The licenses granted in England and Ireland to the different clergymen who have private chapels, as well as to those who have chapels erected under the modern Acts of Parliament, in like manner, confer, in express terms, the *authority to preach* in such chapels. Thus, all the forms negative the sufficiency of orders to confer a general authority to preach.

It was argued, as already noticed, though not so firmly, that the mere institution or license by one Bishop gave the clergyman so instituted or licensed authority to preach in every other diocese, even supposing he had not acquired such authority by his ordination; and though a Bishop, if left at perfect liberty, would never have admitted the clergyman to the benefice in question, but whom he could not reject without some legally valid objection. If the conferring a benefice or a license to serve a cure and preach in one diocese be a sufficient authority for a clergyman so instituted or licensed to preach in every other diocese, without the license or permission of the local Ordinary, some trace of it should be found in the forms referred to, but they never vary. Whenever the change of cure renders a license necessary, that license contains authority to preach the Word of God in the new cure, though it be in the same diocese as the former cure; which would negative the assertion that the orders of priesthood alone conferred the right to preach, or that the license to preach in a cure amounted to a general license to preach in all other cures. This argument, based on the effect of institution or license by some other Bishop, has been also formed out of the discontinuance of the general license to preach, as if the gap left thereby must be filled by some authority other than that of the Bishop of the diocese, which was thereby strengthened and confirmed.

It would be an intelligible argument, and consistent with the general polity of the Church government, to say, that institution or license, by which authority is given to preach in any benefice

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or cure, or chapel, by an Archbishop, should stand in place of a general license by him; but it could not be pushed further, consistently with sound reasoning. There is not even an allegation that any usage has existed for Incumbents to admit to their pulpits a clergyman prohibited by their Bishop from acting in his diocese, or in any particular parish. The usage, in point of fact, has been the other way.

In the cases of Mr. Taylor and a Mr. Nolan, and one or two others, the inhibition of the Archbishop of Dublin had the effect of preventing the prohibited clergyman from acting in the diocese; and I believe that in England there have been several instances of inhibitions having had the like result. However, a usage of that description, if it had existed, would have but little effect, it amounting to no more than an assertion of right on the one side, and a denial on the other, without any adjudication on the subject.

This right of metropolitan and diocesan control over the pulpit has been adopted in the Acts relating to clergy, ordained for the Colonies and foreign countries, as well as for Scotland, and preserved by the Acts of 59 G. 3, c. 60, s. 3; 3 & 4 Vic., c. 33, ss. 1, 2, 3; and though such authority is thereby controlled in respect of the frequency of its exercise, no rights are transferred to the Incumbents of parishes, other than what they ever possessed in respect of the admission of strange preachers, viz., that their consent should be given thereto.

The general rule, that no clergyman can preach or officiate in any diocese, without the express or implied authority of the Bishop thereof, has been laid down by the Judges of the Temporal as well as of the Ecclesiastical Courts, in the cases referred to in the argument: *Finch v. Harris* (a); *Smith v. Lovegrove* (b); *Trebec v. Keith* (c); *Carr v. Marsh* (d); *Hodson v. Dillon* (e); *Freeland v. Neal* (f); *Office v. Nixon*; *Milward* (in note), p. 390; *Office v. Gladstone*; *Office v. Morton*; *Office v. Gregg*. In two of which, viz., *Finch v. Harris*, and *Smith v. Lovegrove*, it is expressly laid down, that letters of ordination are insufficient to confer authority, though they put the clergyman in a capacity to be so authorised to preach and officiate.

The cause of *Office v. Nixon* was finally heard before Dr. Miller, in April 1838, sitting as Surrogate of the Vicar-General; and in the course of that judgment, Dr. Miller quotes and adopts an opinion of Dr. Phillimore, as stated in the *Christian Examiner*, for May 1838, p. 325, viz.:—"I apprehend that a Bishop has no authority

(a) 12 Mod. 641.

(c) 2 Atk. 498.

(e) 2 Curt. 388.

(b) 2 Lee, by Phill. 163.

(d) 2 Phill. 206.

(f) 1 Rob. 643.

to prevent any Incumbent within his diocese from admitting into the pulpit of his church any regularly ordained Minister of the Established Church, not resident within his diocese, from preaching an occasional sermon in any church within his diocese, provided he has the sanction of the Incumbent of that church for so doing ;" which Dr. Miller adopts, if, as he adds, "by occasional sermon, be understood only a sermon preached in the course of that reciprocal accommodation which the parochial clergy have long been in the habit of giving and receiving, and the *Bishop of allowing*." He then proceeds to discuss the soundness of Dr. Phillimore's opinion ; but the subject thereof was not involved in the question raised for Dr. Miller's decision. It seems from the observation, p. 292, that the reviewer considered that Dr. Miller had unequivocally conceded the long debated "question of pulpit jurisdiction, and had given his opinion that an Incumbent had a right to avail himself of the occasional assistance of any ordained Minister," in the sense entertained by the reviewer, viz., in opposition to the Bishop ; but having regard to Dr. Miller's qualification, at p. 325, by the words, and "the Bishop of allowing," already quoted, his *dicta* do not bear that interpretation, though they certainly are rather obscure, particularly when read in conjunction with the opinion of Dr. Phillimore, which he, to a certain extent, adopts ; and in which opinion, as set out in the *Christian Examiner*, of September 1860, p. 213, Dr. Phillimore denies the Bishop's power to prevent any ordained Minister, whether belonging to his diocese or not, from preaching in his diocese, if admitted by an Incumbent so to do ; and says, "The Bishop, *a priori*, cannot object to the preacher ; but if the doctrine preached be repugnant to the Word of God, the Bishop may proceed against the preacher in the Ecclesiastical Court."

The cases like *Office v. Neal* and *Hodson v. Dillon* are all founded on the general rule of the Church, that the Bishop might, at his will and pleasure, revoke the license and authority given by him to any clergyman, to preach or officiate in his diocese, who had no benefice or cure therein ; though having such, a judicial proceeding is necessary before such persons could be deprived of their rights. Though none of the cases cited were in respect of occasional preaching or officiating in parish churches, the rules referred to by the Judges who decided thereon are general in their application, and were pronounced in order to lay down the principles on which the particular cases should be decided. In none of them is it even suggested that occasional violation of a Bishop's orders would be no offence. The sentences in the cases of *Smith v. Lovegrove* (a),

(a) 2 Lee ; affirmed on appeal.

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*Freeland v. Neal (a), Office v. Nixon, Office v. Gregg, Office v. Gladstone*, although the four latter were pronounced in causes instituted against Clerks for preaching and officiating in unconsecrated buildings, proceed on the sole ground that the Clerks were not licensed by the Bishop of the diocese; and by each of such sentences they were respectively forbidden to preach or officiate in such buildings, *or elsewhere in the diocese*; which prohibited them from so preaching or officiating in a parish church, though invited by the Incumbent, unless licensed by the Bishop so to do, thus declaring the law to be as laid down by the Judges in their preliminary *dicta*; for if such licenses were not required to authorise occasional preaching and officiating, the prohibition against so doing "*elsewhere in said diocese*" would have been erroneous; as appears by the judgment in 2 *Lee*, p. 171, where that very point, in respect of officiating (the prohibition against preaching elsewhere in the diocese being admittedly correct), was the subject of appeal. The only case that contains a suggestion of doubt, as to the necessity of a license even to read prayers, is that of *Martin v. Hinds*, in *Cowp.*, pp. 444-5; where Lord Mansfield is reported to have said, "But a Priest employed by anybody to read prayers wants no authority; the very ordination gives him authority; he wants no license; he signs no articles; the Bishop cannot inhibit him, and the office is temporal." But this *dictum* (if uttered as reported) was not at all relevant to the point under discussion here, but referred to a class of persons called readers, who need not have been in Priests' or Deacons' orders, and seems rather inconsistent (so far as it states that the ordination gives him the authority) with Lord Mansfield's argument. There is much doubt, besides, as to the authenticity of the report in other respects, inasmuch as the *dictum* does not appear in the fuller report of the case in 1 *Doug.*, p. 146. It has no application, however, to preaching without the authority of the Bishop; and, if the *dictum* be authentic, it should be applied to the class then under discussion, as already noticed.

It has been further contended by the Advocates for impugnants, that, even supposing the Bishop could have inhibited, as done here, he was bound to cite the impugnants, or give them an opportunity of showing cause against the issuing of the inhibition; and, for this, *Bonnaker v. Evans (b)*, with the authorities therein cited, were relied on. The principle of those cases, as stated by Parke, B., is, "That a man cannot incur the loss of liberty or property, for an offence, by a judicial proceeding, until he has had a fair opportunity

(a) 1 Rob. 651.

(b) 16 Q. B. R. 162.

of answering the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary." But the inhibition is not, as already observed, in the nature of a judicial proceeding; it is, in substance, merely the withdrawal of the Bishop's implied permission for Mr. Potter to preach in his diocese, till he should have obtained special and express permission to do so; and this suit is the judicial proceeding to punish him for having done so. If the Bishop has the joint control with the Incumbent over the pulpit, as claimed, he had a clear right to exercise it according to his own discretion. Mr. Potter had no right in the matter; he, by his 5th Article, disclaims the diocese and repudiates the Bishop as his Ordinary. He could not have obtained a mandamus against the Bishop to compel him to admit him, Mr. Potter, to preach, or to examine, or license him. His cure was in the diocese of Leighlin, where he is presumed to be resident; and he could not have been cited or summoned to the Court of Down and Connor, unless he had committed an offence therein, which he had not done till he had preached.

The cases of *Hodson v. Dillon*, and *Office v. Gladstone*, are strong instances of this difference between cases wherein ecclesiastical rights, or others, are in question, and cases where there are no such recognised rights; for both Mr. Dillon and Mr. Gladstone had been officiating in proprietary chapels, by license duly obtained from the Bishop, but they were not chapels consecrated, dedicated, or allowed by the Ecclesiastical Law, or by statutes. And it was held that the Bishop was entitled to revoke, as he had done, such licenses, at his mere will and pleasure, without any cause assigned, or allowing those gentlemen any opportunity of showing cause against his so doing, there being no recognised rights, irrespective of such licenses, in either of such parties; as fully appears by Dr. Lushington's judgment in *Hodson v. Dillon*, adopted in *Office v. Gladstone*. They had what would appear, in popular language, to have been vested rights, such as would have entitled them to have been allowed an opportunity of showing cause against the order to revoke their licenses, as well as against the issuing of the inhibition, but legal rights they had none. So Mr. Potter, or any other clergyman, without benefice or cure in the diocese, has no legal right to preach or officiate therein. Every Incumbent might exclude him from his church or parish as an officiating Minister, at his will or pleasure, even though he should be licensed or authorised by the Bishop to preach and officiate in every parish in his diocese. The Incumbent is the only person who could even pretend to a right to bring in a clergyman to preach and officiate in his

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church, by way of obtaining occasional assistance. But the right of an Incumbent cannot, on any sound principle, be extended beyond that of his right in having permanent assistance. They both rest on the same grounds, that no clergyman can preach or officiate in a diocese without the authority, express or implied, of the Bishop thereof. The Incumbent or Perpetual Curate obtains, by institution or license, the cure of souls of and in the entire parish; but that cure can only be deputed to or divided between them and others by the like authority of the Bishop; and if an Incumbent or Perpetual Curate desires to have the assistance of a permanent Curate, the Bishop's license or authority is necessary. The canons, ancient and modern, are express on the subject. The Bishop, if he disapproves of the clergyman nominated, may refuse his license. The person nominated, or, perhaps, the Incumbent, might obtain a mandamus to compel the Bishop to examine the person nominated, and inquire into his fitness; but if the Bishop returns that he has done so, and conscientiously disapproves of the person in question, the matter would end there, as he could not be compelled, by a Court of Law, to approve when he disapproved. This is clear, from *The King v. Archbishop of Canterbury and Bishop of London (a)*; *Murray v. Archbishop of Armagh*, unreported. It is not necessary to consider whether or not further redress might be obtained from the Metropolitan. If an Incumbent has no right to have the permanent assistance of a Curate, without the approbation or license of his Bishop, it is difficult, if not impossible, to discover any valid reason for his being clothed with an absolute right to obtain occasional assistance, by allowing a clergyman, not beneficed or licensed in the diocese, and forbidden and inhibited by the Bishop, to preach and officiate in his church, when all the evils already mentioned might arise. If the Incumbent have no such right, then he was not entitled to have an opportunity allowed to him for showing cause against the issuing of the inhibition. But, in point of fact, Mr. Miller had, at the meeting of the 7th of August, an opportunity of stating his reasons against Mr. Potter being inhibited. It is to be presumed that Mr. Miller urged every topic he could, to induce the Bishop not to prevent Mr. Potter preaching; and he appears, by his letter of the 10th of August, to have pressed the Bishop, on that 7th of August, with the pecuniary circumstances of his case; but the Bishop decided not to allow Mr. Potter to preach, as then communicated to Mr. Miller in person, and afterwards by the letter of the 8th of August to Mr. Miller, and which was to have been made known to Mr. Potter. Mr. Miller, in his reply of the 10th of August, again

(a) 15 East, 135-6.

urges reasons against Mr. Potter being inhibited, but precluded all further discussion, by asserting his own absolute control over his pulpit. There is no claim, on the part of Mr. Miller, by that letter, for a further hearing for himself or Mr. Potter; so that the argument in support of his right to be heard in opposition to the issuing of the inhibition is scarcely admissible, unless pushed to the extent that a suit should have been instituted and decided before Mr. Potter could be inhibited.

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On the whole, therefore, I am of opinion that the Bishop had a legal right to prohibit Mr. Potter, as he has done, by the inhibition of the 11th of August, from preaching or officiating in the parish church of Shankhill, or elsewhere in his diocese; and also to prohibit Mr. Miller from permitting Mr. Potter to do so; and that, without assigning any cause for so doing, or allowing the parties prohibited an opportunity of showing cause against the issuing of such prohibition. Though holding that the Bishop has the legal right to act as mentioned, I do not mean to convey that such right should be exercised without his having good cause for so inhibiting a clergyman; but merely that the Bishop has the legal right vested in him, so to decide as to the propriety of permitting or not permitting a clergyman holding no benefice or cure in his diocese, nor any license from a superior Ordinary, or from the Crown, to preach or officiate in his diocese; and the sentence must be in accordance with this view. But, as no censure or punishment is required or prayed, the only other matter to be considered is the question of costs. I have not entered on the subject of the oath of canonical obedience taken by Mr. Miller at his institution, "that he will perform true and canonical obedience to the Bishop of Down and Connor, and his successors, in all things lawful and honest," or his ordination vow; because it is quite clear that he believed that the Bishop had no lawful authority to prohibit Mr. Potter from preaching; and, further, that he believed there was nothing in Mr. Potter's conduct to justify that inhibition. Besides, the suit is not framed, either in its statements or prayer, as a suit to punish Mr. Miller for perjury; the substantial question raised thereby being that of the Bishop's jurisdiction, the oath of canonical obedience being rather thrown in to support the case made; and there is not so much as an allegation that he wilfully or knowingly violated same. The very suggestion that an Incumbent of long standing and high character was induced to offer resistance to his Bishop, and subject himself to a charge of having violated his oath, shows with what caution, delicacy and judgment, the right of inhibiting clergymen from preaching in a diocese should be

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exercised. The act will always be considered by the person inhibited, and his friends, as an insult ; and the more he is esteemed, the wider will be the circle of irritation. In an ordinary suit by a Bishop, to enforce discipline, or the performance of duties, costs would have been given as a matter of course ; but the only breach of discipline here imputed depends on the final decision on a point of law, never before, that I can discover, submitted for adjudication by any Court since the Reformation. Though I have now arrived, without doubt, at a decision in favour of the Bishop's authority, it is well known that many able lawyers have entertained, and still entertain, a different opinion on the subject. In 1838, the late Dr. Miller, presiding in the Metropolitan Court of Armagh as Surrogate (not being at that time, as he afterwards was, Vicar-General and Chancellor), referring to this opinion in *Office v. Nixon*, volunteered *dicta* on this subject of pulpit jurisdiction, which was not involved in that case, and to some extent adopted Dr. Phillimore's views, already adverted to, though he qualified them by the words respecting the Bishop's approval, already mentioned ; however, his language was such as to mislead unprofessional men, who had Dr. Phillimore's opinion before them, and which related solely and exclusively to the power and authority of the Bishop. This judgment of Dr. Miller was circulated among the clergy, and commented upon, as already mentioned, as conceding the control of the pulpit. When Mr. Miller found himself treated in what he considered to be a hard and unjust manner, and perhaps somewhat irritated at a sudden and unexpected interruption of his arrangements to extricate himself from pecuniary liabilities incurred by him to promote a pious and good object, he tried back on his supposed rights, and naturally relied on a judgment delivered in his own Metropolitan Court, of which, it is reasonable to presume, he had a recollection. Both parties (whether wisely or not is beside the question) having resolved to have the validity of the Bishop's claim put in a train for legal adjudication, the suit seems to have been fairly conducted for that purpose. The question was such as to necessitate the arguments of able Counsel, the expense of bringing whom down specially to Armagh would have been extremely heavy.

This was properly met by a consent to have the legal argument on the exceptions to impugnants' pleadings carried on in Dublin, and thereby each party was saved a large expenditure—more, in my judgment, than would cover the whole costs of the suit which could have been decreed to the Bishop, even if costs should be awarded against the impugnants. Though the Advocates for impugnants indulged somewhat freely in imputing improper motives to

the Bishop, and drew on their imagination in that respect, there not being a fact suggested by plea or letter to warrant any inference of the kind, I cannot impute to impugnants the impropriety of having suggested such attacks, which Counsel, in the heat of argument, made on the opposing party. Further, Mr. Potter had been ordained and licensed in the diocese of Down and Connor, wherein he held a cure up to 1849, when he obtained a perpetual cure in Leighlin, but continued to preach and officiate occasionally in his former diocese up to the period of this transaction, with the privity of the Bishop, without any fault being imputed to him in respect of his orthodoxy, or otherwise; and though the Bishop, on the 7th of August, told Mr. Miller he disapproved of the tone of a sermon preached by him, Mr. Potter, on the 12th of July, and of a letter subsequently published, he does not appear to have intimated to Mr. Potter that he objected to his preaching in his diocese. Mr. Potter was thus left free to preach as before in the diocese, and undertook to do so on the 12th of August for Mr. Miller. Mr. Miller, in his interview of the 7th of August, appears to have declined to communicate the Bishop's objection to Mr. Potter, until he should have received a letter from the Bishop, containing his views. So the Bishop wrote the letter of the 8th of August, which seems to have been received on the 10th of August, when Mr. Miller replied thereto, in the manner already stated; but Mr. Potter had nothing to do with this letter; and, as he appeared for the first time in Belfast on the 11th of August, never seems to have known he was objected to until that day. He was publicly announced to preach on the 12th of August, where he was well known, and seems to have been esteemed as a preacher. All this was very unfortunate, as tending to produce great irritation among the laity, who always stand by their favourite clergy with zeal, and often without temper or moderation, and also as tending to produce feelings in Mr. Potter's mind that he was lowered in public estimation, if not insulted. Neither he nor Mr. Miller would yield; and the sermon proceeded as stated, without anything wrong being suggested to have been uttered by Mr. Potter on the occasion. Judging from the tone of Mr. Miller's letter of the 10th of August, I do not think that he would have invited Mr. Potter to preach, nor probably would Mr. Potter have accepted of an invitation to preach in the diocese, if the Bishop had intimated to him, after the sermon of the 12th of July, and before the announcement for the 12th of August, that he objected to him so doing; and I do not consider either him or Mr. Miller guilty of a deliberate attempt to set the Bishop's authority at defiance; who, if he had declared his views at an

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earlier period, would most probably have been obeyed, and this suit would never have been necessary; or Mr. Potter might have obviated the Bishop's objections, which were only to the tone and temper of his sermons (if he would not be satisfied with Mr. Potter's promise on the subject), by sending the Bishop the sermon he intended to preach, to satisfy him that nothing would be uttered tending to increase or cause bad or angry political feelings. Under all these circumstances, I think that the sentence should be pronounced without costs, thus leaving each party to pay his own costs of this suit.

*Decree.*

Decree and declare that said Rev. T. F. Miller be admonished and inhibited from permitting the Rev. S. G. Potter to perform Divine Service, or administer the Sacraments, or preach in the said parish church of Shankhill, otherwise Belfast, or elsewhere in the said parish, mentioned or referred to in the articles exhibited on the part of the Promoter of the Office, until licensed or duly authorised thereto; and let the parties respectively abide their own costs in this suit.

Decree and declare that the Rev. S. G. Potter be admonished and inhibited to abstain from performing Divine Service, or administering the Sacrament, or preaching in the parish church of Shankhill, otherwise Belfast, mentioned or referred to in the articles exhibited on the part of the Promoter of the Office, or elsewhere in the diocese of Down and Connor, until licensed or otherwise duly authorised thereto; and let the parties respectively abide their own costs in this suit.

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A employed B, a builder, to take down the front wall of his house, and execute some other repairs. While the works were in progress, C, the occupier of the adjoining house, served a notice upon A, that injury was likely to result to his house from the repairs, and that he would hold A respon-

A †

sible. B, upon this being mentioned to him, wrote on the estimate of the works the following memorandum:—  
 "In carrying out the *foregoing* work, I hereby undertake to hold myself responsible for any injury done to the adjoining houses." Some works in addition to these in the estimate were done, the contract was completed, and B paid in full for all. C brought an action against A, averring negligence, and alleging various injuries to his house from the works. B, upon being called upon to settle or defend the action, made no reply, and soon after became bankrupt, and absconded. A, having had to pay £191. 7s. 11d. damages and costs, and £60, his own expenses in the action, sought to prove for £251. 7s. 11d.—  
*Held*, that (supposing the memorandum to constitute a contract upon a valuable consideration) the damages which C might recover against A were not necessarily identical with those contemplated by the guarantee, and that A could not prove for the above sum, either as for a debt payable upon a contingency, within section 257, or as for a liability to pay money upon a contingency, within section 258. Banktcy., &c. *In re Quin* 57

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A testator bequeathed one-half of the interest of a sum to A and B, and the other half to C and D during their natural life, and, after the death of A, B, C and D, he bequeathed the principal to E, and he appointed residuary legatees. A died, and then B, leaving C and D surviving.—*Held*, that no part of the principal or interest went to E during the life of C and D.

*Held also*, that the executrix of B, and not the residuary legatees, was

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A testator devised all his estate in a certain chattel leasehold interest in lands, and "all other my property and worldly estate whatsoever," to a trustee, upon trust, in the first place, to preserve the said chattel interest, by payment of head-rent and renewal fines. He then bequeathed certain pecuniary legacies, and, among others, a sum of £100 to the trustee; "and as to, for and concerning all the residue of my interest in my said lands, and as to, for and concerning the residue, similarly, of my other personal estate and effects, subject to the hereinbefore trusts, I hereby give, bequeath and devise all such residue of my interest in the said lands, as also all such the residue of my personal estate and effects, in trust for my eldest son." The testator then charged the lands and the residue of his personal estate with certain sums for younger children. The testator then declared that, in case he should die leaving no son, but leaving an eldest or only daughter, then he devised all his interest in said lands, and all the residue of his personal estate, in trust for such daughter, with remainders over; and he directed "that all the intermediate rents and profits of my said lands, as well as of the residue of my said

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other personal estate and effects, which shall accrue, arise or be made out of both said funds," subject only to the provision made for testator's wife by their marriage settlement, and to his debts and funeral expenses, "and to the several legacies hereinbefore enumerated," should go to the trustee. In 1846, Master Henn had made a report, afterwards confirmed by a decree in Chancery, by which he found that the legacies under the will were not charged upon testator's interest in the lands.—*Held*, that, upon the true construction of the will, the legacies were not charged upon the lands.

*Held also*, that the legatees were bound by the Master's report

The Judges of the Landed Estates Court are bound by a final decree of the Court of Chancery.

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## COMMITTAL FOR UNSATISFACTORY ANSWERING.

It is not necessary that the warrant committing a bankrupt for unsatisfactory answering should state that the questions were put by the Judge, or that such should have been the fact. The words "by and before me," at the commencement of the deposition, are sufficient.

In order to discharge the bankrupt, the Court before which he is brought on *habeas corpus* must be

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The three months within which an appeal from an order or decision of the Landed Estates Court must be entered, in accordance with the 41st section of the Landed Estates Act (21 & 22 Vic., c. 72), are to be computed exclusive of the day of the date of such order or decision, and inclusive of the day on which the appeal is entered. Ch. Ap. *In re Kennedy's Estate* 298

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The law of New York recognises, to a certain extent, the rights of the assignees under the adjudication.

A British creditor of a bankrupt, who has, by the means of the laws of any foreign State, succeeded in obtaining possession of the goods of a bankrupt situate in that State is, in this Court, answerable for them to the assignees.

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Lands were conveyed by a registered deed to a purchaser, subject to "existing leases and lettings made to the undertenants" of the vendor.—*Held*, that a parol contract for a lease, with part performance of which the purchaser had no notice, was not an existing lease or letting within the meaning of the deed.

*Semble*—A contract by the vendor, duly signed, according to the Statute of Frauds, would be an existing lease or letting, within the meaning of the deed, and binding on the purchaser. The distinction between equitable estates and equitable rights considered.

In a suit for specific performance of a contract relating to lands, the documents relied on to prove the contract must be put in issue specifically by the petition.

*Semble*—Part performance of a contract is not binding on a purchaser for valuable consideration without notice. *R. Rice v. O'Connor* 510

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S. S., a lessee of certain premises, for 125 years from the 25th of March 1782, by a lease, dated the 21st of July 1787, and which contained the usual clauses of distress and re-entry, demised the same to E. H., for 120 years from the 25th of March then last past. Twenty-two years' arrears of rent accrued due to the representatives of the lessor in the last-mentioned lease.—*Held*, that,

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although S. S. had no reversion expectant on the determination of the said lease of the 21st of July 1787, yet that the rent reserved by the said lease was a conventional rent, and that, therefore, the right of the representatives of S. S. to the rent during the residue of the term was not barred by the 3 & 4 W. 4, c. 27, s. 2. L. E. Ct. *In re Turner's Estate* 304

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## DECREE IN CHANCERY.

Although a Judge of the Landed Estates Court will not act in opposition to, but is bound by, a final decree in Chancery—[*See In re Lanauze*, 11 Ir. Chancery Rep. 19]—yet where it appears that the rights of minors have been prejudiced by such decree, the Court will retain the purchase-money, to enable the minors to obtain redress in Chancery. L. E. Ct. *In re Hunt's Estate* 299

## DEED.

1. A father joined in a settlement executed on the marriage of his daughter, which contained a recital that he was desirous to give her, as a marriage portion, such sum or child's share as he might be entitled to dispose of, which child's share it was calculated would be at the least £5000, but the same, or the precise amount thereof, could not be ascertained until his decease; and the intended husband, who had a power to jointure to the amount of £10 per cent. on the fortune which he should receive with

his wife, appointed a jointure of £500 a-year, which was also collaterally secured on other lands, not the subject of the power. The daughter died in G.'s lifetime.

*Held*, that the recital amounted to an absolute covenant that his daughter should have, on his death, an equal share of his personal estate with his other children.

*Semble*—If it was not a covenant, it would have amounted to a binding representation to the same effect.

*Held also*, that the obligation was not discharged by the daughter's death in his lifetime.

*Held also*, in calculating the amount payable under the covenant, sums advanced to other children by the testator in his lifetime should be taken into account and be added to the assets.

*Held also*, that interest should not be calculated on the sums so advanced.

R. *Duckett v. Gordon*

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2. A marriage settlement vests freehold leases in trustees, "to hold to the use of the said A and his heirs and assigns, from the perfection of these presents, for and during the term of his natural life, without impeachment of waste," with a power to lease, remainder to said trustees to preserve, and, from the decease of A, to secure a jointure of £80 to B (A's wife). Then follows a covenant by A, charging the jointure on after-acquired estate, with power of distress; "and further, that said lands, after the decease of the survivor of A and B, in case there should be but one child of said marriage, to the use of such only child, and the heirs of his or her body lawfully issuing; and in case there should be more than one such child, then to such children in such shares and proportions as the said A shall by deed or will appoint; and in default of such appointment, then to the use of all the children, as tenants in common, share and share alike."—



*Held*, that the words "and his heirs" should be rejected, and that A takes a life estate.

That the clause beginning "and further" is a limitation in continuation of, and direct sequence upon, the limitations to trustees to preserve.

*Semble*—That if that clause be a covenant to settle after-acquired property on the children, a Court of Equity would not mould the trusts in any manner, as they are fully declared.

*Semble*—That, assuming it to be such a covenant, after-acquired property, settled, irrespective of such covenant, by A on a child, must be brought into hotchpot. *L. E. Ct. In re Hammersly* 229

#### DEPOSIT OF LEASE, TO PREPARE LEGAL MORTGAGE.

A deposit of title-deeds, to be delivered to a solicitor, for the purpose of preparing a legal mortgage to secure an antecedent debt and future advances, though there be no agreement in writing for a mortgage, constitutes a valid equitable mortgage. *R. Bulfin v. Dunne* 198

#### DESCENDIBLE FREEHOLD.

An estate of descendible freehold, settled to the separate use of a married woman, cannot be validly conveyed by her without fine or statute deed. *C. Adams v. Gamble* 269

#### DESCRIPTION OF PARTIES.

*See JUDGMENT MORTGAGE, 5.*

#### DEVISE.

*See WILL, 11, 12.*

#### DISCLAIMER OF LANDLORD.

*See RENEWAL, 2.*

#### DISTRIBUTIONS, STATUTE OF.

*See SETTLEMENT.*

## FRAUD.

### DOWER.

*See PRACTICE, 1.*

### EQUITABLE MORTGAGE.

*See DEPOSIT OF LEASE, TO PREPARE LEGAL MORTGAGE.*

### ESTATE TAIL.

*See WILL, 5.*

### ESTOPPEL.

*See PRACTICE, 1.*

### EVIDENCE.

*See GRANT.*

### EXECUTRIX AND RESIDUARY LEGATEES.

*See REQUEST.*

### EXONERATION.

*See WILL, 2.*

### FIERI FACIAS.

*See JUDGMENT CREDITOR.*

### FINAL DECREE IN CHANCERY BINDING ON LANDED ESTATES COURT.

*See CHARGE ON LANDS.*

### FINAL EXAMINATION.

Where a bankrupt had traded recklessly, by means of accommodation bills, and had got extensive credit by representations that he was solvent, and that said bills were for value, the Court adjourned his final examination, *sine die*, upon the state of facts disclosed by his schedule. Banktcy, &c. *In re Lockhart* 68

### FINE.

*See DESCENDIBLE FREEHOLD.*

### FORM OF COMMITTAL.

*See COMMITTAL FOR UNSATISFACTORY ANSWERING.*

### FRAUD.

*See MORTGAGE, 1.*

## FREE ADMISSION.

### FREE ADMISSION.

*See THEATRE.*

### FREEHOLD.

*See DESCENDIBLE FREEHOLD.*

## FUTURE ESTATE, COVENANT TO SETTLE.

*See DEED, 2.*

### GENERAL ORDER.

*See COMPUTATION OF TIME FOR  
APPEALING FROM LANDED  
ESTATES COURT.*

### GRANT.

By deed of 1769, A granted a perpetual yearly rentcharge of £134, payable out of certain lands held by him for three lives, perpetually renewable. That deed was lost; but it appeared, from a memorial thereof, that A had granted to B and C, for the uses mentioned in the deed, a yearly rentcharge of £134, for ever, issuing out of the said lands. The rentcharge was paid by the owners of the lands from 1769 down to 1860, when a petition was presented to the Landed Estates Court for a sale of the rentcharge.—*Held* (overruling a decision of a Judge of the Landed Estates Court), that the memorial, coupled with evidence of the payment of the rentcharge down to 1860, was sufficient evidence of a perpetual subsisting rentcharge, so as to enable the Court to sell. Ch. Ap. *In re Harding* 29

### HEIRS.

*See WILL, 5.*

### HOTCHPOT.

*See DEED, 2.*

### HUSBAND AND WIFE.

By a marriage settlement, lands were conveyed to trustees, to the separate use of A, the wife, for life; and, in

## INDEMNIFICATION. 533

case B, the husband, should survive her, to him for life, and, after the death of the survivor of A and B, in trust to convey to the child or children of the marriage, as A and B should, by deed or will, appoint, and, in default of appointment, to the children equally, and, in default of issue, to the survivor of A and B. There was issue; and by deed reciting that A, in order to further the prospects in life of the children, and that B, for the like purpose, agreed to assign his reversion, in case he should survive his wife, A, for the considerations aforesaid, and 10s., conveyed her life interest to trustees, in trust to receive the rents during the life of A and B, and apply them for the benefit and maintenance, &c., of the children, in such manner as the trustees might deem sufficient. And it was agreed that the trustees should have full power and control over the property during the life of A and B, free from the control or intermeddling, debts, &c., which at any time might have affected the estate of A and B; and B covenanted that, if he should survive his wife, he would, if called on by the trustees, assign his estate and interest to the trustees, on the said trusts.—*Held*, that the children were not within the consideration, and could not enforce a specific performance of B's covenant to assign his interest. R. *Joyce v. Hutton* 123

### ILLEGITIMATE SON.

*See WILL, 5.*

### IMPEACHMENT.

*See PARTNERSHIP ACCOUNT, STATED AND SETTLED, WHAT AMOUNTS TO.*

### IMPLICATION.

*See WILL, 3.*

### INDEMNIFICATION.

*See TENANT FOR LIFE.*

## INSOLVENT.

## INSOLVENT.

The decision in this case, *ante*, vol. 9, p. 559, confirmed.

Property acquired by an insolvent, subsequently to his insolvency, is charged with a first trust for his subsequent creditors; and, before the Court will attach such subsequently acquired property, it must be satisfied that the insolvent is of ability to pay his scheduled debts; and this ability to pay is not to be determined by the casual possession of a fund, but by the possession of assets *ultra* the liabilities subsequently incurred.—*Banktey, &c. In re Johnston* 62

## INTEREST.

*See RAILWAYS (IR.) ACT.*

## INTEREST AND PRINCIPAL.

*See BEQUEST.*

## ISSUE.

*See WILL, 5.*

Where the Judge of the Court of Probate directs issues respecting testamentary papers, the Court of Appeal will not vary his order, merely on the ground that the issues directed do not exclude all consideration of questions of law. *Ch. Ap. Newton v. Newton* 239

## JOINTURE.

*See WILL, 14.*

## JUDGMENT.

*See MORTGAGE, 2.*

A judgment recovered in 1819, and never revived nor re-docketed, must be postponed not only to the gales of a rentcharge created by the judgment debtor in 1827, and assigned in 1841, which accrued due after that period, but to the arrears of it which were then due, and which were included in the assignment. *C. Walcott v. Smyth* 266

## JUDGMENT MORTGAGE.

## JUDGMENT CREDITOR.

The defendant in an execution being the registered proprietor of shares in a ship, a writ of *fi. fa.* was delivered to the Sheriff; and the solicitor for the creditor, by the direction of the Sheriff, procured the certificate of registry from the ship, and delivered it to the Sheriff, who retained it. The Sheriff was registered at the Custom-house, under the Merchant Shipping Act, as the owner of the shares, which were afterwards sold by him and transferred to the purchaser by a bill of sale, which was also registered.—*Held*, that the seizure was effectual, although the Sheriff did not go on board the ship, and that the property in the shares was regularly transferred by the bill of sale. *R. Harley v. Harley* 451

## JUDGMENT MORTGAGE.

1. In an affidavit filed under the provisions of the 6th section of the 13 and 14 *Vic.*, c. 29, for the purpose of converting a judgment into a mortgage, a description of the defendant's last known place of abode, as "late of the town of Galway, but now of the county of Dublin," was held insufficient, as being too vague.

The same affidavit stated the amount of the judgment to be £894, and £3. 2s. 8d. for costs; whereas the sum mentioned for costs on the record was £2. 2s. 8d., the fee of £1 for registration having been added to the costs in the affidavit.—*Held*, to be such a variance as invalidated the affidavit. *Ch. Ap. In re Fitzgerald's Estate* 278

2. If an affidavit, filed for the purpose of registering a judgment as a mortgage, under the provisions of the 13 & 14 *Vic.*, c. 29, substantially complies with the requirements of the 6th section of that statute, it is sufficient. Therefore, where such an affidavit was entitled in the same words as the record of the judgment, and stated

(*inter alia*) that "J. T., the plaintiff, by the name and description of J. T., of 116 Grafton-street, in the city of Dublin, solicitor, did, on the 15th of July 1858, obtain a judgment in the Court of Exchequer, against the defendant in this cause, by the name and description of E. S. P., of, &c. . . . . that the usual or last-known place of abode of the said E. S. P., the defendant in this cause, the person whose estate is intended to be affected by the registration of this affidavit, is at, &c. . . . . that, to the best of deponent's knowledge and belief, the said E. S. P., the defendant in this cause, is, at the time of swearing this affidavit, seised or possessed of," &c., &c.—*Held*, first, that the above affidavit contained a sufficient statement of the title of the cause.

Secondly; that the affidavit sufficiently identified the defendant in the judgment with the person whose estate was sought to be affected by the registration of the affidavit. Ch. Ap. *In re Power's Estate; Taylor, appellant* 288

3. An affidavit registered under the 13, 14 *Vic.*, c. 29, s. 6, stated that the sum recovered by the judgment was £265, with £3. 2s. 8d. for costs. The record of the judgment stated that the sum recovered was £265, besides £2. 2s. 8d. for damages, and £1 for registry. *Held*, that the above was not such a variance as would invalidate the affidavit. Ch. Ap. *In re Edgeworth's Estate; Davis, respondent* 293

4. In an affidavit registered under the 13 & 14 *Vic.*, c. 29, s. 6, a statement "that deponent was, and still is, a gentleman," was held to be a sufficient description of the plaintiff, where he had not any trade or profession. Ch. Ap. *In re Edgeworth's Estate; Smith, respondent.* 294

5. An affidavit filed for the purpose of registering a judgment as a mortgage, under the provisions of the 13 & 14 *Vic.*, c. 29, was entitled in the margin

"J. M., of D., in the county of W., farmer, plaintiff; T. J. F., of B., in the county of W., Esq., defendant." The affidavit stated that J. M., of, &c., &c., had recovered a judgment "against the defendant in this cause, by the name and description of Thomas Joseph Fitzgerald, of Ballinaparka, in the county of Waterford, Esq."—*Held*, that the above was a sufficient description of the name and usual or last known place of abode of the defendant.

*Seem*, that a supplemental affidavit, filed under the provisions of the 21 & 22 *Vic.*, c. 105, may be filed after the death of the conusor. Ch. Ap. *In re Fitzgerald's Estate* 356

6. Statements in the title of a judgment mortgage affidavit may be incorporated, by reference, in the affidavit itself. A description of the residence of the parties, in an affidavit to register a judgment as a mortgage, will be sufficient, if it be their ordinary trade residence. The description must be substantially contained within the affidavit itself. Such affidavits need not be construed with strict grammatical accuracy. [*McDowell v. Wheatly* commented on and distinguished.] Banktcy., &c. *In re Smith & Ross* 394

## JURISDICTION.

*See* LANDED ESTATES COURT.

LUNACY.

PROTECTION ORDER.

RENTCHARGE.

WASTE.

The time of a trader's "residing or carrying on business in Ireland" (Irish Bankruptcy & Insolvency Act, s. 31), means the time of presenting the petition. The Irish Court has exclusive jurisdiction over such trader, though he owe debts contracted in England, while he was residing and trading there. Banktcy., &c. *In re Sanderson* 421

## LACHES.

*See* RENEWAL, 2.

SPECIFIC PERFORMANCE.

## 536 LAND IMPROVEMENT ACT.

### LAND IMPROVEMENT ACT.

A rentcharge granted to secure a loan to an owner in fee, subject to a rent, by a grant prior to the 14 & 15 *Vic.*, c. 20, has priority over the rent, under the Land Improvement Act, 10 *Vic.*, c. 32, s. 38.

*Semble.*—Where the loan is made to a tenant, the rentcharge has not priority over the rent reserved by his lease, such rent not being a charge or incumbrance, within the meaning of the 38th section of the Land Improvement Act. R. *Attorney-General v. Evans* 171

### LANDED ESTATES COURT.

The power given to the Landed Estates Court under the 72nd section of the 21 & 22 *Vic.*, c. 72, is discretionary, and exists both in the case of an incumbered and unincumbered estate. The consent of the landlord is not necessary; but the Court requires that it should be clearly shown that his interest is not in any appreciable degree made less secure, less enjoyable, or less marketable than before. If, however, there is any reason to believe that the petition has not been presented for a *bona fide* sale, but for the purpose of obtaining an apportionment, the Court will make such an order as will apportion the rent, only in case the proceedings be duly prosecuted, and the sale duly had. L. E. Ct. *In re Comyn's Estate* 320

### LANDED ESTATES COURT, FINAL DECREE IN CHANCERY BINDING ON.

*See CHARGE ON LANDS.*

### LANDLORD, DISCLAIMER OF.

*See RENEWAL, 2.*

### LAW, QUESTION OF.

*See ISSUE.*

### LAWFUL MALE HEIR.

*See WILL, 9.*

## MERGER.

### LEASEHOLD CONVERSION ACT.

*See RENEWAL, 1.*

### LEGACY.

*See WILL, 13.*

### LIABILITY TO PAY MONEY UPON A CONTINGENCY.

*See BANKRUPTCY.*

### LIMITATIONS, STATUTE OF.

*See CONVENTIONAL RENTS,  
ARREARS OF.*

### LOAN.

*See LAND IMPROVEMENT ACT.*

### LOST DEED.

*See GRANT.*

### LUNACY.

C., having been found a lunatic, by inquisition, obtained leave to traverse. The LORD CHANCELLOR directed one of the Masters of the Court to act as committee, and to oppose the traverse, which he did by the General Solicitor for Minors and Lunatics. The traverse was successful.—*Held*, that C. was not entitled to have the receiver discharged, without providing for the costs of the General Solicitor for Minors and Lunatics, incurred in his case. C. *In re Crosbie* 432

### MALE HEIR, LAWFUL.

*See WILL, 9.*

### MARRIED SONS AND DAUGHTERS.

*See WILL, 13.*

### MARSHALLING.

*See MORTGAGE, 2.*

### MEMORIAL.

*See GRANT.*

### MERGER.

*See TENANT FOR LIFE.*

## MINOR'S RIGHTS.

### MINOR'S RIGHTS.

*See DECREE IN CHANCERY.*

### MISDESCRIPTION.

*See WILL, 8.*

### MISREPRESENTATION.

*See FINAL EXAMINATION.*  
MORTGAGE, 1.

### MORTGAGE.

1. S., being largely indebted to B. and other persons, agreed with B. for a further advance, on a mortgage of various estates in Ireland. By the deed of mortgage, S. covenanted that the lands of K., which formed part of the security, were free from incumbrances, and for further assurance. No title was furnished by S., nor search in the registry in Ireland made by B. Before the entire advance was paid over to S., it was discovered that the lands of K. were subject to a mortgage to E. B. thereupon applied to S., who told him that E. would release the lands on his (S.'s) request; on which assurance B. paid over the residue of the loan to S. S., subsequently, by fraud, procured a release from E., of which release B. was made aware, but was ignorant of the fraud. The fraud was discovered after some months had elapsed.—*Held*, that B. was a purchaser for value of the release, as having been procured by S., in pursuance of the covenants in the mortgage deed; and that, being ignorant of S.'s fraud, he was entitled to retain the advantage which the release had given him. Ch. Ap. *In re Burmester* 1
2. A mortgages Blackacre to B, and gives him as a collateral security a judgment which attaches on both Blackacre and Whiteacre. Subsequently B assigns his debt and securities to C, and A at the same time mortgages Blackacre to C for a further sum, with a covenant against all incumbrances except the mortgage to B.—*Held*, that C, as against a *puiſne*

## OBJECTION, &c. 537

incumbrancer, is entitled to be paid the debt assigned to him by B out of Whiteacre first, so as to leave Blackacre unimpaired to meet the second mortgage made to C himself. L. E. Ct. *In re Roddy's Estate* 369

### MORTGAGE, AGREEMENT TO.

*See PRIORITY.*

### MORTGAGE, EQUITABLE.

*See DEPOSIT OF LEASE, TO PREPARE LEGAL MORTGAGE.*

### MORTGAGE DEED.

A mortgagor, by a proviso in a mortgage deed, agrees in a certain event to sell to B, the mortgagee, for a fixed sum, part of the mortgaged premises.—*Held*, that the proviso was totally void, as being an onerous engagement entered into *at the time* of the mortgage. L. E. Ct. *In re Edwards' Estate* 367

### NAME.

*See WILL, 8.*

### NO REMEDY AT LAW.

*See RENTCHARGE.*

### NOTICE.

*See CONTRACT.*

MORTGAGE, 1.

### OBJECTION FILED BY ANOTHER PARTY, TAKING ADVANTAGE OF.

*See OBJECTION TO INCUMBRANCE, ON SETTLEMENT OF FINAL SCHEDULE IN LANDED ESTATES COURT.*

### OBJECTION TO INCUMBRANCE, ON SETTLEMENT OF FINAL SCHEDULE IN LANDED ESTATES COURT.

The owner of an estate sold in the Landed Estates Court was held to be estopped from objecting, upon the settlement of the final schedule of incumbrances, to a claim which he

had admitted, in his affidavit filed as an answer to the conditional order for sale, to be a charge upon the estate. He had also suffered the conditional order to be made absolute, and a sale to be had, without disputing the claim in question.

An incumbrancer cannot avail himself of an objection filed by another party to the validity of a claim, to which he has not himself filed an objection. Ch. Ap. *In re Power's Estate; Reeves ptr.* 295

#### OWNER, WHEN ESTOPPED.

*See the foregoing.*

#### PART PERFORMANCE.

*See CONTRACT.*

#### PARTIES, DESCRIPTION OF.

*See JUDGMENT MORTGAGE.*

#### PARTNERSHIP ACCOUNT, STATED AND SETTLED, WHAT AMOUNTS TO.

No precise form is necessary to constitute a stated and settled partnership account.

An account drawn up in the handwriting of one partner, A, eight years after the dissolution of the partnership, stating the assets of the firm at the time of the dissolution, and taking the excess of the assets over the original capital, as representing the balance of profit over loss on the several transactions, and stating the amount drawn out by each partner, and the amount coming to each, and in which account A, after giving credit for various payments made to him by his co-partner, B, after the dissolution, struck a balance against himself, and which account was assented to by B:—*Held*, a stated and settled account, though some debts due to the partnership were omitted as uncertain.

A party seeking to impeach or surcharge and falsify a stated and settled account must state the fraud or

error on which he relies, in the petition.

If a partnership be admitted, the books are admissible in evidence, in taking the account of the partnership transactions; but the books of A are not admissible against B to prove a partnership, if it be denied. R. *Sim v. Sim* 310

#### PARTITION SUIT.

The respondent in a partition suit resisted the petitioner's claim, alleging that the petitioner was not seised of any portion of the lands in question. Considerable expense was thus imposed on the petitioner; but that expense was entirely incurred before and at the first hearing, at which a decree for partition was made, and further directions and costs reserved. At the hearing on the return to the writ of partition and further directions—*Held*, that the petitioner was not entitled to be paid by the respondent any portion of his costs up to and including the first hearing. C. *Knox v. Mayo* 265

#### PAYMENT.

*See GRANT.*

#### PETITIONER.

*See PRACTICE, 2.*

#### PLAINTIFF, DESCRIPTION OF.

*See JUDGMENT MORTGAGE, 4.*

#### PLEADING.

*See CONTRACT.*

PARTNERSHIP ACCOUNT, STATED AND SETTLED, WHAT AMOUNTS TO.

#### POST-NUPTIAL SETTLEMENT.

*See HUSBAND AND WIFE.*

#### POWER.

*See WILL, 7.*

## POWER TO JOINTURE, EXECUTION OF.

A, being tenant for life, with a power to jointure, with remainder to B, his eldest son by his first marriage, in tail, charged a jointure, on his second marriage, which was not authorised by the power. A and B afterwards joined in barring the estate tail, for the purpose of securing by mortgage a sum advanced to A. The disentailing deed recited the power and the charge of the jointure, and by it the lands were conveyed to a trustee, without prejudice to the jointure, to such uses as A and B should appoint, and, in default of appointment, to such uses as were subsisting before the execution thereof, so as to secure and restore the former title to the lands. By a contemporaneous deed, to which the jointress was a party, reciting the power and charge of the jointure, and the contract for a loan of £1000 to A and B, to be secured by a mortgage discharged of the jointure, but to the intent only that it should be postponed to the £1000, and the interest on it, and reciting the conveyance by the disentailing deed, subject to the jointure, A and B appointed the lands by way of mortgage to secure the £1000, and the jointress released the lands from the jointure, with a proviso that the release should take effect only for the purpose of postponing the jointure to the £1000. By another deed of the same date, reciting the disentailing deed, and that the lands were charged with £1000, for the use of A, he granted a rentcharge to a trustee for B.—*Held*, that the charge of the jointure being void was not confirmed by the deeds, and that the mortgage deed did not operate as a re-grant of the jointure, the intention being merely to postpone the jointure to the mortgage.

A tenant for life had a power, by deed or will, to charge a jointure, not exceeding £100 a-year, for every £1000 which he should actually and *bona fide* receive with his wife. On

his marriage, a life estate of his wife, in a chattel interest in lands, was conveyed to him for life. The tenant for life received, before the date of the will, about £2000 out of the rents of said lands.—*Held*, that the charge by his will of a jointure of £200 a-year was valid if £2000 was received, and that, if said sum was not received, the jointure should abate proportionably. *R. Brereton v. Barry*

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## PRACTICE.

1. A widow filed a bill for dower against alienees of her husband. In order to make out her title to dower, the petitioner was obliged to give in evidence a deed, by which the estate had been conveyed to the person from whom her husband claimed. This deed contained a recital that the legal estate was outstanding in certain trustees. The petitioner also gave in evidence certain orders of the Court of Chancery, to show that such recital was mistaken.—*Held*, that she was entitled to a reference to ascertain the lands of which she was dowable. Ch. Ap. *Kernaghan v. M'Nally* 52
2. Where there are no incumbrances prior to his, a petitioner having the carriage of the suit is entitled to his costs out of a fund the produce of real estate, in the first instance, and in priority to the demands and the costs of creditors in equal priority with him.

*Taylor v. Gorman* (1 Dr. & W.) observed on. *R. Watson v. Fitzpatrick* 213

## PRIORITY.

*See* LAND IMPROVEMENT ACT.

- A enters into an agreement, to the following effect:—"That he should execute a mortgage, payable with interest at £5 per cent., in four years, to B and C, to secure to them an amount awarded, viz., £3120, with interest at £5 per cent. on the principal sum of £2600, late currency, from the 27th



of April 1842, the date of the award, A giving reasonable proof that he has power to grant such mortgage, and that the property to be mortgaged is adequate security for it.—*Held*, that such an agreement (though not sufficient to ground a decree for immediate specific performance) would authorise the Court of Chancery to order A to select a sufficient portion of his estates, and make it a security in compliance with the agreement.

*Held also*, that, after the lapse of four years and A's death, it could not be specifically enforced against the heirs and devisees of A, but would enable B and C to institute an administration suit, and claim that a sufficient portion of A's real estate be applied in payment of the debt.

*Held also*, that this being so, it was (after a sale in the Landed Estates Court) to be regarded as a specific charge, taking priority of general creditors, but *puisne* to other specific charges. L. E. Ct. *In re Humble*

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#### PROCEEDINGS IN TRADE ASSIGNEE'S NAME, WITHOUT HIS CONSENT.

A, a bankrupt, having become able to pay in full, obtained an order of the Court, directing that, upon paying the creditors 20s. in the £1, and paying the assignees' costs, the carriage of proceedings in bankruptcy should be transferred, and the estate re-assigned to him. The creditors were paid in full; but, owing to the delay of the agent of the bankruptcy in getting his costs taxed, A was unable to pay off said costs, and get the carriage of proceedings transferred, and the estate re-assigned. Upon giving B, the official assignee, a letter, indemnifying B and C, the official and trade assignees, A got an authority from B to take proceedings in the names of B and C for the recovery of debts due to the estate. A, having brought an action in the names of B and C, was

served by C with notice to discontinue, on the ground that he had no authority to use C's name. The defendant in the action took defence, and gave notice of motion to set aside the summons and plaint, on the same ground. This Court, having been applied to while the motion in the Law Court (C. P.) was pending, ordered that said motion be not moved, that the action be proceeded with, and that C should pay the costs of this motion and of the motion in the C. P. Banktcy., &c. *In re McKenna* 65

#### "PROCESS," DEFINITION OF.

*See* PROTECTION ORDER.

#### PROTECTION ORDER.

On the 3rd of November, R. D. filed a declaration of insolvency; on the 22nd of November, F., a creditor of R. D., with notice of the act of bankruptcy, seized the goods of R. D. under a *fi. fa.* On the 24th of November, R. D. presented a petition for arrangement, and obtained the usual protection order.—*Held*, that the order for protection operated against the previous seizure, so as to prevent the execution creditor proceeding to a sale.

The Bankrupt Court has jurisdiction to make an order restraining the execution creditor from proceeding.

Remarks on the *laches* of both parties in delaying the application to the Court.

The rights of the execution creditor, in such a case, will be protected (in the event of the arrangement proving abortive), by the lodgment of a sum of money in Court, to meet his demand in that event. Banktcy., &c. *In re Delahoyd* 404

#### PROVISO TO SELL TO MORTGAGEE FOR FIXED SUM VOID, AS ONEROUS.

*See* MORTGAGE DEED.

## PURCHASE-MONEY.

### PURCHASE-MONEY, RETAINING IN COURT.

*See DECREE IN CHANCERY.*

### PURCHASER.

*See VENDOR AND PURCHASER.*

### PURCHASER WITHOUT NOTICE.

*See CONTRACT.*  
*MORTGAGE, 2.*

### QUESTION OF LAW.

*See ISSUE.*

### RAILWAYS (IRELAND) ACT.

A person who traverses the award of the arbitrator, under the Railways Act (Ireland) 1851, is not entitled, under the 22nd section of the Act, to interest at £5 per cent. on the amount of the damages awarded by the verdict, from the time when the Railway Company went into the possession of the lands. *R. In re Dundalk and Enniskillen Railway Co.* 467

### RECEIVER.

*See RENTCHARGE.*

### RECITAL.

*See DEED, 1.*

### RECKLESS TRADING.

*See FINAL EXAMINATION.*

### REGISTRY, AFFIDAVIT OF.

*See JUDGMENT MORTGAGE, 1.*

### RELEASE.

*See MORTGAGE, 1.*

### RENEWAL.

1. In the conversion of a lease for lives renewable for ever, the Landed Estates Court will make no substantial increase in the rent, by reason of the commutation of the covenant giving the landlord the right of pre-emption. *L. E. Ct. In re Jackson* 145
2. In 1808, L., being seised of a lease

## RENEWAL FINES. 541

for lives renewable, conveyed it to his eldest son J., for life, with remainder to X, the eldest son of J. In 1813, L. acquired the reversion of the renewable lease, and in 1822 conveyed the reversion to R., the eldest son of his second marriage. In 1854, H., the heir-at-law of R., filed a cause petition against the executrix of X, to recover arrears of the rent against X's assets. As a defence to that suit, it was alleged that L. was insane when he executed the conveyance of 1822. In May 1857, H. served a notice on Y, the heir of X, and also of L., calling on him to take out a renewal. To this notice Y returned an answer, declining to take out a renewal till H.'s right was established in the cause petition, but nominating lives to be inserted in the next renewal, if H. should establish his right, and stating his readiness to pay into Court the amount of the renewal fines, to the credit of the then pending petition. In June 1857, the Master made an order establishing H.'s right to the reversion, as against the executrix, which was affirmed on appeal, on the 11th of January 1858. There were some further proceedings in H.'s suit up to November 1858. In December 1858, Y tendered a renewal and fines to H., and filed a petition for renewal in February 1859—*Held*, that the tender was too late, and that the right of a renewal was forfeited. *Ch. Ap. Long v. Long* 252

### RENEWAL, COVENANT FOR.

*See SPECIFIC PERFORMANCE.*

### RENEWAL FINES.

The contributions to renewal fines of the tenant of a College lease, and his sub-tenant, with a *toties quoties* covenant for renewal, are in proportion to the annual value of their respective interests.

In calculating the value, the rent payable by each is to be deducted.

If there were buildings on the land

**RENT.**

at the date of the sub-lease, they are to be taken into account in ascertaining the value.

*Quære*—If the buildings have been afterwards erected? R. *Orr v. Littlewood* 502

**RENT.**

See LAND IMPROVEMENT ACT.  
LANDED ESTATES COURT.

**RENTCHARGE.**

See GRANT.  
JUDGMENT.  
LAND IMPROVEMENT ACT.

A demised certain lands for lives renewable for ever, at £70 a-year. A afterwards agreed to purchase the lessee's interest, then vested in B, in consideration of a perpetual rentcharge of £20 a-year; and, to carry out the contract, B demised the lands for the same lives, renewable for ever, at a rent of £90 a-year, to C, in trust for A. C died; whereupon the interest in the latter lease became vested in B, as C's heir-at-law.—*Held*, that a suit could be maintained by B for a receiver to recover the arrears of the profit-rent of £20, there being no remedy for it at Law. R. *Tobin v. Redmond* 445

**REPRESENTATION.**

See DEED, 7.

**REPRESENTATIVE OF LESSOR.**

See CONVENTIONAL RENTS, ARREARS OF.

**RESIDUE.**

See WILL, 2, 10.

**RESIDUARY LEGATEE.**

See BEQUEST.

**RETURN TO WRIT.**

See PARTITION SUIT.

**REVIVAL AND RE-DOCKETING.**

See JUDGMENT.

**SPECIFIC PERFORMANCE.****SALE.**

See LANDED ESTATES COURT.

**SECRET TRUST.**

See WILL, 4.

**SEIZURE OF SHARES IN SHIP.**

See JUDGMENT CREDITOR.

**SEPARATE ESTATE,  
CONVEYANCE OF.**

See DESCENDIBLE FREEHOLD.

**SETTLEMENT.**

A marriage settlement contained a clause that the provision thereby made and intended for the wife, in the event of her viduity, should be accepted, deemed and taken in full lieu of dower or thirds, to which she might be entitled at Common Law, or otherwise howsoever.—*Held*, that she was barred of her share of her husband's personal estate, under the Statute of Distributions. R. *In re Burgess' Trusts* 164

**SHERIFF, BILL OF SALE BY.**

See JUDGMENT CREDITORS.

**SPECIFIC PERFORMANCE.**

See CONTRACT.  
THEATRE.  
WILL, 14.

In 1827, a lessor, as to whom it was disputed whether she was only tenant for life, or was entitled in *quasi* tail for lives renewable for ever, made a lease for her own life, with a covenant that if she should be enabled, either separately or in conjunction with any other person or persons, to grant the said premises for any longer term than was thereby granted, she would, at the request and costs of the lessee, execute all such further act or acts, &c., for the purpose of granting the premises to him, for any term not exceeding three lives, with covenant for perpetual renewal, on payment of a peppercorn fine on the fall of each

## SPECIFIC PERFORMANCE.

life, at the rent thereby reserved, &c., and the lessee covenanted for himself, his heirs and assigns, with the lessor to accept such grant. It was decided by the Court of Appeal (7 Ir. Chan. Rep. 388) that the lessor was tenant in *quasi* tail.

*Semble.*—The covenant was a personal covenant, binding on the lessor during her life, and did not descend with the land.

No claim was made on foot of the covenant during the lifetime of the lessor, who died in 1854. Judgments had been obtained by the petitioners for the same debt against the lessee and R., who was entitled in remainder to the reversion, and who afterwards became entitled to the lessee's interest. After the lessee's death, a petition was filed by creditors of R., in the Incumbered Estates Court, for sale of the reversion, on the ground that the lessor was only tenant for life, or, if she were tenant in *quasi* tail, that she had not barred the entail. The petitioners were made parties in that matter, as judgment creditors of R.; and, after it was dismissed by the Court of Appeal, they had, in other proceedings in the Landed Estates Court, admitted the right of the respondents, who were devisees of the lessor, and had gone into possession of the lands.—*Held*, that the right to a specific performance of the covenant had been abandoned, and was barred by laches and acquiescence.

A judgment creditor of a tenant may maintain a suit for a renewal.  
R. *Homan v. Skelton* 75

## STATUTES QUOTED.

- 3 & 4 W. 4, c. 27.  
3 & 4 Vic., c. 107, ss. 78, 79, 80.  
13 & 14 Vic., c. 29, s. 6.  
20 & 21 Vic., c. 60, ss. 225, 226, 227, 257, 258.  
21 & 22 Vic., c. 72, s. 41.

## THEATRE.

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### STOCK IN TRADE.

*See* WILL, 12.

### SUPPLEMENTAL AFFIDAVIT.

*See* JUDGMENT MORTGAGE, 5.

### TAKING ADVANTAGE OF OBJECTION FILED BY ANOTHER PARTY.

*See* OBJECTION TO INCUMBRANCE,  
ON SETTLEMENT OF FINAL  
SCHEDULE IN LANDED ES-  
TATES COURT.

### TENANT FOR LIFE.

*See* WILL, 7.

A, tenant for life of lands (with power of charging £1000 thereon for his own use), with remainder (in the events which happened) to his daughter B in tail male, by a deed, for value, conveyed the lands, and all his interest therein, to B, subject (amongst other things) to the charge of £1000, and covenanted for good title, quiet enjoyment and further assurance. B subsequently became the purchaser of a judgment for £3000, entered up against A before the date of the conveyance.—*Held*, that although the effect of the conveyance was not to merge the charge during the lifetime of A, yet that the petition must be dismissed with costs, on the principle of Equity that a tenant for life, having a charge on the inheritance for his own benefit, cannot deal with it so as to prejudice a judgment creditor on his life estate, and also because, under the covenant for quiet enjoyment, A was bound to indemnify B against the judgment, the amount of which he must pay before he could raise his charge of £1000. L. E. Ct. *In re Gardiner*

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### TENANTRY ACT.

*See* RENEWAL, 2.

## THEATRE.

The owners of a theatre, by deed bearing date in 1839, made for valuable

## 544      THIRDS, BAR OF.

consideration, covenanted to confirm to certain debenture holders the privilege of free admission to the theatre. The petitioner was entitled, as one of the debenture holders, to the benefits of the deed of 1839, but subsequently lost his debenture. In 1851, the respondent became lessee of the theatre, with notice of the deed of 1839. *Held*, that the petitioner was not entitled specifically to enforce against the respondent the privilege of free admission created by the deed of 1839. *C. Malone v. Harris*      33

## THIRDS, BAR OF.

*See SETTLEMENT.*

## TRADER REMOVING FROM LONDON TO DUBLIN.

*See JURISDICTION.*

## TRAVERSE.

*See LUNACY.*

## TRUST.

A testator, being possessed of £4000 stock, bequeathed of it £2000 to an individual. £1000 of the remainder he bequeathed for the use of Protestant schools of St. Peter's parish, and another £1000 for the use of the school attached to the Episcopal chapel in B.-street. The chapel in B.-street had no school attached to it. B.-street was in St. Peter's parish.—*Held*, that with regard to the second £1000, the will showed a general charitable intention, which might be executed *cy pres*, in favour of Protestant schools in St. Peter's parish; and it was referred to the Master to settle a scheme accordingly.

The costs, down to and including the hearing, ordered to be paid out of the residue; the costs of the reference to be borne by the fund. *C. Daly v. Attorney-General*      41

## VALIDITY OF AFFIDAVIT.

*See JUDGMENT MORTGAGE, 2, 3.*

## WASTE.

### VALIDITY OF JUDGMENT.

*See JUDGMENT MORTGAGE, 4.*

### VARIANCE.

*See JUDGMENT MORTGAGE, 1.*

### VARIANCE AS TO SUM RECOVERED FOR COSTS.

*See JUDGMENT MORTGAGE, 3.*

### VENDOR AND PURCHASER.

Where a purchaser is in possession of lands, under an executed conveyance, and part of the purchase-money has been secured by a bond, the purchaser may come into Equity to have it employed in discharge of an arrear of head-rent due at the date of the conveyance, and is not confined to his remedy at Law, on the covenants in his conveyance. *Ch. Ap. Woods v. Martin*      148

### VERDICT.

*See RAILWAYS (IRELAND) ACT.*

### VOLUNTARY COVENANT.

*See HUSBAND AND WIFE.*

## WASTE.

Where a lessee, bound by covenant not to commit waste, has committed acts of waste, for which damages merely nominal would be given, the Court of Chancery will not entertain a suit against him, founded on those acts of waste, where it appears that he does not contemplate committing any further waste, nor assert a right to commit it. No change in this respect has been introduced by the Chancery Amendment Act 1858.

A tenant, by replying to a letter charging him with the commission of waste, and requiring him to make compensation for it, "that he is prepared to defend any action which may be brought against him, and to show that, so far from having committed injury, he has materially improved the premises demised to him," does

not assert a right to commit the waste complained of. *C. Doran v. Carroll* 379

## WIDOW.

See SETTLEMENT.

## WIFE'S FORTUNE.

See POWER TO JOINTURE, EXECUTION OF.

## WILL.

1. Bequest of the interest of £500 to A for life, and, as to the principal, after the decease of A, and as "to all other property belonging to me, that I may die seised and possessed of or entitled unto, in trust, for the use, benefit and behoof of" B and her children, "without the control or intermeddling of her husband, and to be paid in such manner as my said trustees shall in their discretion think fit."—*Held*, that B took a life interest in all the property, with remainder to all her children born in A's lifetime, before and after the death of the testatrix. *R. Scott v. Scott* 114
2. A lapsed share of a residue of real and personal estate, devised, subject to the payment of debts, funeral and testamentary expenses, is not liable to the debts of the testator, in exoneration of the rest of the residuary estate, but rateably with it. *L. E. Ct. In re Rathborne* 141
3. Where there is an indefinite bequest to the parent, and, if he die without having or leaving children, over, the children do not take by implication.

Where there is a bequest to the parent for life, and, if he die without having or leaving children, over, the children are not entitled by implication.

Where there is a bequest to the parent for life, and, if he die without having or leaving children, over, and there are matters in the will to raise an inference in favour of the children, the Court is at liberty to take them

in connection with the bequest in the event of the parent dying without having or leaving issue, and to hold that the children are entitled by implication.

A testator bequeathed to each of his grand-nephews, A and B, an annuity for their respective lives, and, in case of the death of either of them, leaving issue, he directed that the annuity of him so dying should go to such issue, if more than one, share and share alike; the share or shares of such child or children as should die under twenty-one or marriage to go to and be equally divided amongst the survivor and survivors of such issue, during their respective natural lives; and if but one, the whole of the annuity to go to such only child for life; and in case of the death of either A or B without lawful issue living at his death, that the annuity of him so dying should go to the survivor for his life; and in case of the death of both A and B without leaving issue, or, leaving such, and that such issue should die before the age of twenty-one years, then, after the death of the survivor of such issue of A and B, he directed that the said two annuities should sink into his residuary personal estate. A died without issue.—*Held*, that there was a bequest, by implication, of A's annuity to the children of B. *R. Kinsella v. Caffrey* 154

4. A testator bequeathed to his two sons all his property, real and personal, to have and to hold the same in the most absolute manner, and he declared it to be his will and intention that his sons should at their discretion, and according to their own judgment, allocate to the other members of his family, being his lawfully begotten children, such portions of the said property and goods, be the same more or less, as to them should seem fit and suitable; and he appointed his said sons his executors.—*Held*, coupling the will with an admission in the petition by the sons, of the testa-

tor's intention, that a trust had been created, and that the sons were trustees for the other children of the testator as to the entire property of the testator, both real and personal. *R. Gray v. Gray* 218

5. A, by his will, dated the 29th of May 1836, bequeathed to his illegitimate son, R. S., certain leaseholds, and, if the said R. S. should die without "heirs or issue," over.—*Held*, that as the 29th section of the Wills Act is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body;" and therefore ("without heirs," in the said will, meaning "without heirs of the body," R. S. being illegitimate), the will did not confer the absolute interest on R. S., with an executory devise over in the case of his dying without issue living at his death, but an estate tail, and, the property being leasehold, the absolute interest. *L. E. Ct. In re Sallery* 236

6. A testator gave all his property, real and personal, to trustees, and directed that they should sell his freehold estate, and make up an account of his estate, so that they might be able to make a division among his nine children, to whom he left the same in equal shares. After other directions, he declared that he left the shares of his daughters to them for their respective lives, free from the control of their husbands, with power to appoint the same among their children, notwithstanding coverture. In a subsequent clause he directed that the shares of his sons who should have attained twenty-one at the time of his death should forthwith vest in them; and that the shares of the other sons should vest as they should afterwards respectively attain the ages of twenty-one years; and the shares of the daughters on marriage; and that the shares of the sons who should die under twenty-one, and of daughters who should die unmarried, should go

amongst the survivors as therein mentioned. J., one of the testator's daughters, married, and died without having exercised the power of appointment, leaving one child.—*Held*, that J. took an absolute interest in her share of the fund. *C. M'Tear v. M'Dowell* 338

7. A testator, by his will, made in 1836, executed a power of appointing among his younger sons a sum of £2000, charged by his marriage settlement on the lands of H., of which he was tenant for life. After his death, his eldest son, who took the lands of H., as tenant in tail, conveyed them in 1837, to trustees, to secure a sum of £1600, by way of mortgage; the younger sons being parties to the mortgage, and consenting thereby to postpone their claims to it; and, at the same time, the eldest son executed his bond collateral, for securing the same sum, and warrant, upon which judgment was entered. In 1841, the eldest son purchased the lands of F.; and, in 1845, a judgment was obtained against him by S. The lands of H. and F. were subsequently sold in the Landed Estates Court; and the proceeds of H. having proved insufficient to pay the amount due on foot of the mortgage, it was ordered, by a Judge of that Court, that the mortgage debt should be paid rateably out of the proceeds of H. and F., and the surplus of H. applied in discharge of the appointees' claims, and the surplus of F. in discharge of the judgment of 1845.

This Court, upon appeal, reversed that decision, being of opinion that no equity had arisen upon the purchase of F., in favour of the appointees under the will, so as to entitle them to insist upon the mortgagee's claim being paid rateably out of the proceeds of H. and F.; and that, consequently, the doctrine of marshalling did not apply. *Barnes v. Racster* (1 Y. and Col., Ch. Cas., 401) commented on. *Ch. Ap. In re Lawder's Estate* 346

8. A, by his will, leaves to F. M. F., and to "his sister, M. F., my granddaughter, share and share alike, said M. F. now living in France with her uncle M.," all his estates. M. F. was not then living, and had never lived, while her sister, C. F., was living, and had lived, for some time, with the said uncle M.—*Held*, that extrinsic evidence was admissible to explain the ambiguity in the will.

*Held also*, that there was not such a perfect balance of probabilities as to suspend the action of the Court.

*Held also*, that the name should control the description, and that M. F. was, therefore, entitled. L. E. Ct. *In re Plunkett's Estate* 361

9. Bequest of portion of a chattel real "to my son J., and, if J. dies without a lawful male heir, his part of the land falls to his brother R. I also order that the part of the lands which I bequeath to my son J. is to fall to his youngest son, without any incumbrance."—*Held*, that J. did not take an absolute interest in his portion of the lands, and that the gift over to R. was not too remote. Ch. Ap. *Dodds v. Dodds* 374

10. A testatrix, after many pecuniary and some specific bequests, proceeded, "The remainder of my property I leave to my sister S. F.;" then, after a few legacies, "I appoint my two sisters, S. F. and O. G., my executrices and residuary legatees of this my last will."—*Held*, that the gift of the remainder of her property to S. F. was not revoked, and that the appointment of S. F. and O. G., residuary legatees, only gave them any legacies which lapsed. C. *In re Jessop* 424

11. A testatrix devised several annuities, which she directed only to be a lien upon and charged on the yearly income of her lands, real, freehold and chattel real, but not upon any other personal estate; and she directed that if the yearly income of her lands

should fall short of paying the annuities, the deficiency should equally and proportionably be upon all such annuities, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be vested upon her personal estate; and she devised the residue of her property, real and personal, after satisfying and discharging said annuities, &c. The income of the lands was insufficient to pay the entire of the annuities.—*Held*, that the annuities, being charged on the income of the lands only, were, for each year, satisfied by payment of a proportionable share, and that the arrears were not charged on the future rents. R. *Fitzgerald v. O'Connell* 437

12. A testator, having three sons, A, B and C, devised certain property to A; and other leasehold property, together with all the stock-in-trade which should be in the premises, to B and C, as tenants in common; and in case his said sons, or either of them, should die without leaving lawful issue him surviving, he directed that the share of such son so dying, in the premises, and in the stock-in-trade which should be therein at the time of such decease, should go to and be divided, share and share alike, between such of his said sons as should be then living, as tenants in common. B and C carried on the trade after the testator's death; and B died without issue, leaving A and C surviving.—*Held*, that no case of election arose, there being no condition attached to the bequest, that the stock on the premises, at the death of either of the sons, should be subject to the bequest. A, therefore, is only entitled to a moiety of the stock-in-trade at the testator's death. R. *Thornton v. Thornton* 474

13. A testator bequeathed to his four daughters unmarried a sum of £2000 each, on their day of marriage, with the consent of his trustees, with interest, by way of maintenance, in the



meantime; and, if one of his said daughters should die without being married, he desired the fortune and legacies of her so being the first to die to go to and be divided equally amongst such of his married sons and daughters as might have issue at the death of such dying daughter. The four unmarried daughters survived the testator; and one of them died unmarried and without issue.—*Held*, that her legacy was divisible among the testator's sons and daughters who were married at the date of the will, and survived her, and had issue living at the time of her death. R. *Elliott v. Elliott* 482

14. A, seised in fee, conveyed lands to B and C, and the survivor of them, and the heirs of the survivor, to the use of A for life, and, after his decease, to the use of B and C, and the survivor, and the heirs of such survivor, upon trust to permit and

suffer D to receive a jointure, and, after the death of D, then to the use of the right heirs of A.—*Held*, that B and C took a legal estate in fee in remainder.

A, having made a will, devising all his property to his wife, and having contracted to sell the lands, and afterwards died:—*Held*, in a suit for specific performance by the purchaser, that the heir-at-law of A was not a necessary party to the conveyance, as he had no legal estate in the lands, and no equitable estate, and no right to institute a suit to set aside the contract, having regard to the will of A, devising all his property to his wife, who, if the contract was set aside, would be entitled to the lands; and, if the contract was not set aside, would be entitled to the purchase-money.—[*Roberts v. Marchant* explained.]—R. *Fowler v. Lightburne* 495

## INDEX TO APPENDIX.

### BENEFICED CLERGYMAN PREACHING.

*See* INHIBITION.

### LICENSE.

*See* INHIBITION.

### INHIBITION.

An inhibition, signed at the Bishop's desire, by the Vicar-General of a diocese, and under the seal of the Consistorial Court, forbidding a strange clergyman preaching in the diocese, is, in fact, the inhibition of the Bishop, and is not a judicial act requiring a previous citation. A Bishop of one diocese has the power to inhibit, at

his pleasure, and without cause assigned, a beneficed and licensed clergyman of another diocese from officiating or preaching in his diocese without his license, though the clergyman has the leave of the Incumbent to preach in his church.

A license to serve a cure in one diocese determines by the curate giving up the cure, and leaving the diocese wherein he was residing.

A usage of clergymen of different dioceses to occasionally assist one another, and preach without the Bishop's license, is of no avail against his inhibition. Consist. Ct. *Bishop of Down and Connor v. Miller* i











